No. 01-1471-CFY Title: United States, Petitioner
v.
John Bass

Docketed: April 5, 2002 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Feb 21 2002	Application (01A632) to extend the time to file a petition for a writ of certiorari from March 7, 2002 to April 6, 2002, submitted to Justice Stevens.
	Feb 22 2002	Application (01A632) granted by Justice Stevens extending the time to file until April 6, 2002.
	Apr 5 2002	Petition for writ of certiorari filed. (Response due June 3, 2002)
	Apr 30 2002	Order extending time to file response to petition until June 3, 2002.
	Jun 3 2002	Brief of respondent John Bass in opposition filed.
	Jun 11 2002	Reply brief of petitioner United States filed.
	Jun 11 2002	DISTRIBUTED for Conference of June 27, 2002
	Jun 28 2002	Petition GRANTED. Judgment REVERSED. Opinion per curiam. (Detached opinion.)

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1 PP

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN BASS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), the court of appeals erroneously permitted a capital defendant to obtain discovery on a claim of selective prosecution in the absence of evidence that "similarly situated individuals of a different race were not prosecuted."

2. Whether, contrary to *McCleskey* v. *Kemp*, 481 U.S. 279, 292, 294-295 & n.15 (1987), the court of appeals permitted a defendant to make a prima facie showing of discriminatory intent, necessary to justify discovery on a claim of selective prosecution, by relying on nationwide statistics that aggregate the individualized decisions made independently by multiple federal prosecutors across the country.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 266 F.3d 532.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2001 (App., *infra*, 27a). A petition for rehearing was denied on December 7, 2001 (App., *infra*, 28a-29a). On February 22, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December 1998, a federal grand jury sitting in the Eastern District of Michigan returned a second superseding indictment charging respondent John Bass with conspiracy to distribute cocaine base in violation of 21 U.S.C. 846; four counts of intentionally killing an individual while engaged in a drug trafficking crime in violation of 21 U.S.C. 848(e)(1)(A); and three counts of murder in the course of using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. 924(j). 12/9/98 Second Superseding Indictment.

On November 16, 2000, the government filed a notice pursuant to 18 U.S.C. 3593(a) that it would seek the death penalty against respondent for two of the firearms murders—the murders of Patrick Webb and Armenty Shelton. Respondent was subsequently charged in a third superseding indictment with conspiracy to possess with intent to distribute and to distribute more than five kilograms of cocaine and more than 50 grams of cocaine base in violation of 21 U.S.C. 846; murdering Patrick Webb in the course of using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. 924(j); and murdering Armenty Shelton in the course of using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. 924(j). 2/27/01 Third Superseding Indictment.

Respondent, who is black, alleged that the government had determined to seek the death penalty against him because of his race. He moved to dismiss the death penalty notice and, in the alternative, for discovery of information relating to the government's capital charging practices. The district court granted the

motion for discovery and subsequently denied the government's motion for reconsideration. App., *infra*, 25a. When the government informed the district court that it would not comply with the discovery order, the court dismissed the death penalty notice. *Id.* at 26a. A divided court of appeals affirmed. *Id.* at 1a-19a.

1. The government's decision to seek the death penalty against respondent was made in accordance with a Department of Justice (DOJ) policy, instituted in January 1995 and commonly known as the death penalty protocol. DOJ, *United States Attorneys' Manual* §§ 9-10.010 *et seq.* (Sept. 1997) (*USA Manual*); see DOJ, *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, at 2 (Sept. 12, 2000) (*DOJ Survey*). Under the protocol, the decision whether to charge a defendant with a capital-eligible offense was, like the decision whether to charge a defendant with any offense, made by one of the 93 United States Attorneys throughout the country. *Id.* at 2 n.2, 9; App., *infra*, 2a. Once the defendant had been charged with a capital-eligible offense, however, the decision whether to seek the death penalty was made by the Attorney General. *Ibid.*; *USA Manual* § 9-10.020.

The protocol required the United States Attorneys to submit for review all cases in which they had charged a defendant with a capital-eligible offense, regardless whether the United States Attorney desired to seek the death penalty. *USA Manual*, *supra*. For each of those defendants, the United States Attorney was required to submit to DOJ's Criminal Division a death penalty evaluation form, a detailed prosecution memorandum, copies of the indictment, other documents or evidence as appropriate, and any written materials submitted by defense counsel in opposition to the death penalty. *Id.* § 9-10.040. The protocol expressly

provided that "bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty." *Id.* § 9-10.080.

The Capital Case Unit of the Criminal Division, composed of attorneys with special expertise in capital prosecutions, reviewed the United States Attorney's submission and drafted an initial analysis and proposed recommendation. The case was then forwarded to the Attorney General's Review Committee on Capital Cases (Review Committee), which includes the Deputy Attorney General and the Assistant Attorney General of the Criminal Division or their designees. The Review Committee met with the Capital Case Unit Attorneys and the United States Attorney and his or her assistants. Defense counsel was afforded the opportunity to present reasons why the death penalty should not be sought. The Review Committee made an independent recommendation, and the Attorney General made the final decision whether to seek the death penalty. *USA Manual* § 9-10.050.

Under the protocol in effect at the time that the government determined to seek the death penalty against respondent, the individual United States Attorneys were not required to submit for review those cases in which they declined to charge the defendant with a capital-eligible offense. *DOJ Survey* 9. In addition, the individual United States Attorneys retained the authority to enter into plea agreements with any defendant that they had charged with a capital-eligible offense. *Ibid.* The Attorney General's approval

of a plea agreement was not required. *USA Manual* § 9-10.100.[1]

2. DOJ conducted a statistical survey of the cases submitted for review under the protocol between January 1995 and July 2000. See generally *DOJ Survey* 1-43.[2] During that period, United States Attorneys charged a total of 682 defendants with capital eligible crimes. *Id.* at 2. Of those defendants, 134 (20%) were white, 324 (48%) were black, and 195 (29%) were Hispanic. *Id.* at 6. The United States Attorneys subsequently withdrew 63 cases from review, and 31 cases were still pending at the end of the survey period. *Id.* at 24.[3] The Attorney General authorized the death

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[1] In June 2001, DOJ revised the protocol to require United States Attorneys to submit for review cases in which a capital-eligible offense could be charged as well as cases in which a capital-eligible offense is charged. *USA Manual* § 9-10.040 (June 7, 2001 Bluesheet) (*USA Manual Bluesheet*); DOJ, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* 18 (June 6, 2001) (*DOJ Supp. Survey*). The protocol was also revised at that time to require the Attorney General's approval of any plea agreement under which the government agreed not to seek the death penalty. *USA Manual Bluesheet* § 9-10.100; *DOJ Supp. Survey* 18.

[2] The survey also reviewed cases submitted under the procedure in effect before January 1995. See *DOJ Survey* 3. Under that procedure, the United States Attorneys submitted for review only those cases in which the United States Attorney recommended seeking the death penalty. See *id.* 1-2. Because the statistics on the prior procedure are not at issue in this case, they are not discussed in this petition.

[3] Of the 63 defendants whose cases were withdrawn, 58 entered into plea agreements. Eight (14%) of those were white, 27 (47%) were black, and 20 (34%) were Hispanic. *DOJ Survey* 31 n.26. The United States Attorneys also entered into plea agreements with 51 of the 159 defendants for whom the Attorney General had authorized the death penalty. Plea agreements were reached with 48% of

penalty for 159 of the remaining 588 defendants. *Ibid.* The Attorney General authorized the death penalty for 44 of 115 white defendants, 71 of 287 black defendants, and 32 of 160 Hispanic defendants. *Ibid.* Thus, the Attorney General authorized the death penalty for 38% of the white defendants, 25% of the black defendants, and 20% of the Hispanic defendants that she considered. *Id.* at 7.[4]

3. Respondent based his claim of selective prosecution in this case on statistics, including those in the *DOJ Survey*, that showed that nearly one-half of defendants who are charged with federal capital crimes and against whom the government ultimately seeks the death penalty are black, while blacks comprise only 38% of all federal prisoners. App., *infra*, 7a-9a. He also relied on public comments on the *DOJ Survey* made on the day of its release by then-Attorney General Janet Reno and then-Deputy Attorney General Eric Holder, as well comments made subsequently by Attorney General John Ashcroft. *Id.* at 9a-10a. The thrust of those comments was that the racial disparities in capital charging were disturbing and warranted further study to ensure that bias played no part in federal charging decisions. *Ibid.*

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the white defendants (21 out of 44 authorized), 25% of the black defendants (18 out of 71 authorized), and 28% of the Hispanic defendants (9 out of 32 authorized). *Id.* at 32.

[4] The rates at which the United States Attorneys and the Capital Case Review Committee recommended the death penalty were similar. The United States Attorneys recommended the death penalty for 36% of the white defendants, 25% of the black defendants, and 20% of the Hispanic defendants. The Review Committee recommended the death penalty for 40% of the white defendants, 27% of the black defendants, and 25% of the Hispanic defendants. *DOJ Survey* 7.

Respondent sought discovery of eight broad categories of information. He requested discovery of all correspondence from the United States Attorney's Office for the Eastern District of Michigan concerning the decision to seek the death penalty against him, including the death penalty evaluation form and the prosecution memorandum. He also requested all policies or manuals used by the United States Attorney for the Eastern District of Michigan to determine whether to charge a defendant under state or federal law, as well as a list, including the race of each defendant and the ultimate disposition of the case, of all death-eligible indictments originating in the Eastern District of Michigan since January 1, 1994. App., *infra*, 2a-3a.

In addition, respondent requested the materials for all cases submitted to capital case review between January 1, 1994, and September 1, 2000, including the caption, case number, a description of the offense, the ultimate disposition of the case, the death penalty evaluation form, the prosecution memorandum, and the non-decisional case identifying information form, for each case.[5] Respondent also requested all standards, policies, practices, or criteria used by DOJ to guard against the influence of race in the death penalty protocol; any correspondence from DOJ to the United

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[5] The non-decisional case identifying information form is a form submitted by the United States Attorney that identifies the race or ethnic origin of the defendant and the victim. That form is not provided to the Review Committee, the Capital Case Unit attorneys who assist the Review Committee, or the Attorney General. The form is provided by the United States Attorney under separate cover to paralegal assistants in the Capital Case Unit who collect statistics on the federal death penalty process. *DOJ Survey* 3.

States Attorneys since January 1, 1994, on death penalty policies or requesting identification of cases for capital prosecution; and a list of all non-negligent homicide cases since January 1, 1994, in which a defendant was arrested and charged by federal or state authorities and in which the defendant could have been charged with a federal capital offense. App., *infra*, 3a.

4. After a hearing, the district court orally granted respondent's motion for discovery "on every particular." 10/24/00 Tr. 51. On October 26, 2000, the district court entered a written order requiring the government to provide respondent with the requested materials within 30 days. App., *infra*, 20a-24a. On December 20, 2000, the court denied the government's motion for reconsideration. *Id.* at 25a. After the United States Attorney's Office informed the court that it would not comply with the discovery order, respondent moved to dismiss the capital counts. On January 10, 2001, the court entered an order dismissing the death penalty notice. *Id.* at 26a.

5. A divided panel of the court of appeals affirmed. App., *infra*, 1a-19a. The court acknowledged that, under *United States* v. *Armstrong*, 517 U.S. 456 (1996), a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent. App., *infra*, 7a. The court concluded that respondent had shown evidence of discriminatory effect based on statistics from the U.S. Sentencing Commission and the *DOJ Survey*. See *id.* at 7a-11a. The court explained that "the evidence shows that although whites make up the majority of all federal prisoners, they are only one-fifth of those charged by the United States with death-eligible offenses. The United States charges blacks with a

death eligible offense more than twice as often as it charges whites." *Id.* at 11a.

The court rejected the government's explanation that respondent had presented no evidence, as required by *Armstrong*, 517 U.S. at 465, that the white persons who were not charged with death-eligible offenses were "similarly situated." App., *infra*, 11a-12a. Although the court did not point to evidence of similarly situated white persons who were not charged, it reasoned that the "similarly situated" requirement was satisfied by evidence that the United States enters plea bargains with one-half of the white defendants against whom it sought the death penalty, but only one-quarter of the black defendants against whom it sought the death penalty. *Id.* at 12a.

The court of appeals also found, based on the same statistics, that respondent presented "some evidence" of discriminatory intent. App. *infra*, 12a-13a. The court found corroboration for that conclusion in statements by the former Attorney General and former Deputy Attorney General that the possibility of racial bias in federal capital charging decisions warranted further study. *Id.* at 13a.

The court rejected the government's argument, based on *McCleskey* v. *Kemp*, 481 U.S. 279, 294-295 & n.15 (1987), that nationwide statistics were not probative of discriminatory intent on the part of the United States Attorney who made the charging decision in respondent's case. App., *infra*, 13a-14a. The court reasoned that, although *McCleskey* would defeat respondent's selective prosecution claim if he was unable to adduce additional evidence after discovery, it did not "pose any bar to [respondent] at this preliminary stage." *Id.* at 14a.

The court of appeals declined to consider the government's position that certain documents were irrelevant, non-existent or already in respondent's possession, because the United States had refused to provide the documents to the district court for in camera review that would have enabled it to evaluate that claim. The court noted that this refusal had also prevented the district court from evaluating the government's claims of privilege. The court therefore affirmed the district court's discovery order and remanded to the district court "with instructions to allow the United States to produce the documents for an in camera review." App., *infra*, 15a. The court noted that, "[i]f the United States again fails to comply, the district court remains free to impose whatever sanction it deems appropriate." *Ibid.*[6]

Senior Judge Nelson dissented from the court's decision to affirm the discovery order. He explained that the essence of respondent's claim was that "the decision of the U.S. Attorney's Office to bring federal death-eligible charges against him" was racially motivated, App., *infra*, 16a, but that the *DOJ Survey* refutes any inference that then-Attorney General Reno, who authorized the filing of the death penalty notice in respondent's case, was guilty of racial discrimination

[6] The court of appeals did not vacate the district court's order dismissing the notice of intent to seek the death penalty. On remand, the government indicated to the district court that it did not intend to produce the documents for in camera review. See Motion and Brief for Continuance of Trial Date and Stay of All Proceedings in the District Court 3. The district court therefore left in place its order dismissing the death penalty notice, and indicated to counsel that it would proceed with a noncapital trial. *Id.* at 4. The district court subsequently granted the government's motion to stay the trial pending this Court's disposition of the instant petition for a writ of certiorari. 3/1/02 Order.

against African Americans, because the survey indicates that she authorized the death penalty against a higher percentage of white defendants than black defendants. He further noted that respondent "is not alleging that the office of the U.S. Attorney for * * * the Eastern District of Michigan * * * declined to negotiate a plea bargain with him because of his race." *Ibid.*

Judge Nelson concluded that the district court abused its discretion in granting respondent discovery on his claim because there is a "complete absence of any evidence that the U.S. Attorney's Office failed to initiate capital-eligible prosecutions against individuals whose situations were similar to that of [respondent] but whose race was different." App., *infra*, 17a (citing *Armstrong*, 517 U.S. at 465, 470). Noting that concern expressed by DOJ officials about the national statistics and the need for further study was not evidence of any improper motive of the United States Attorney's Office in respondent's case, Judge Nelson also found "no evidence here of a racially discriminatory motive." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is flatly inconsistent with two decisions of this Court. First, the court of appeals' decision nullifies this Court's holding in *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), that discovery may not be ordered on a claim of selective prosecution unless the defendant presents "some evidence" that "similarly situated individuals of a different race were not prosecuted." Although the court of appeals purported to apply that requirement, the court inexplicably found the requirement to be satisfied by statistics that have no relevance to the discriminatory

conduct alleged by respondent. Second, the court's decision completely disregards this Court's holding in *McCleskey* v. *Kemp*, 481 U.S. 279, 292, 294-295 & n. 15 (1987). Contrary to that holding, the court of appeals relied on aggregate, national statistics rather than requiring facts that bear on the individualized decisions of the prosecutors in this case. The upshot is that the court eviscerated the "rigorous standard" for discovery formulated in *Armstrong*. 517 U.S. at 468.

The court of appeals' decision trenches on the core prosecutorial function of the Executive Branch and threatens to stop federal death penalty prosecutions in their tracks. The decision requires the government to produce thousands of highly sensitive, internal documents concerning the Attorney General's review of hundreds of capital cases over six years. Production of those documents would improperly intrude on the Executive's Article II function of deciding when criminal prosecution is warranted and would stifle the full and frank internal decision-making that is especially critical in capital cases. If the decision of the court of appeals is permitted to stand and is followed by other courts, the government will be forced to make the untenable choice of either exposing its highly sensitive internal prosecutorial deliberations to public view or abandoning pursuit of the death penalty in cases for which that penalty has been authorized by Congress and approved by the Attorney General. Review by this Court and reversal of the erroneous judgment below is therefore warranted.

I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONTRADICTS THIS COURT'S DECISIONS

A. The Court Of Appeals' Decision Is Flatly Inconsistent With *United States* v. *Armstrong*

In *United States* v. *Armstrong*, 517 U.S. 456 (1996), this Court held that a defendant raising a selective prosecution claim must satisfy a "rigorous standard" to obtain discovery. *Id.* at 468. In particular, a defendant is not entitled to discovery unless he makes a threshold showing of "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." *Id.* at 468 (quoting *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)). The Court further held that, in order to show some evidence of discriminatory effect, the defendant "must show that similarly situated individuals of a different race were not prosecuted." *Id.* at 465.

The court of appeals' holding that respondent was entitled to discovery on his selective prosecution claim contravenes *Armstrong*'s unequivocal holding because respondent presented no evidence that the United States Attorney for the Eastern District of Michigan failed to charge similarly situated white defendants with capital-eligible offenses or that the Attorney General declined to approve the death penalty for similarly situated white defendants. The court of appeals found the necessary evidence of discriminatory effect based on no more than DOJ's nationwide survey showing that black defendants were charged with capital-eligible offenses more than twice as often as white defendants. App., *infra*, 11a; see *DOJ Survey* 6 (of 682 defendants charged with capital-eligible offenses be-

tween 1995 and 2000, 134 (20%) were white, 324 (48%) were black, and 195 (29%) were Hispanic). Respondent, however, produced no evidence that the United States Attorney for the Eastern District of Michigan, who brought the charges against respondent—or any other federal prosecutor—could have, but did not, bring capital-eligible charges against *similarly situated* white defendants.

The *DOJ Survey* cannot satisfy respondent's burden. Because the data submitted by United States Attorneys for the initial *DOJ Survey* did "not include information regarding the entire pool of potential capital-eligible defendants," those data shed no light whatsoever on whether any white defendants who were similarly situated to black defendants were not charged with capital-eligible offenses. *DOJ Survey* 10. Thus, the statistics on national charging practices in the *DOJ Survey* do not make out the "credible showing of different treatment of similarly situated persons" based on race required to warrant discovery. *Armstrong*, 517 U.S. at 470.

In fact, data collected subsequent to the initial survey (which were released after the district court's decision and provided to the court of appeals) indicate that white defendants who were similarly situated to black defendants were no less likely to be charged with capital offenses. After the initial survey was released, DOJ asked the United States Attorneys to submit information concerning cases in their offices in which the facts would have supported a capital charge, but the defendants were not charged with capital crimes. That information, when combined with the 682 defendants included in the initial survey, produced a broader pool of 973 potential capital defendants. Of those 973 defendants, 17% (166) were white, 42% (408) were black, and

36% (350) were Hispanic. Capital charges were brought and the case was submitted for review for 81% of the white defendants, 79% of the black defendants, and 56% of the Hispanic defendants. The Attorney General ultimately decided to seek the death penalty for 27% of the white defendants, 17% of the black defendants, and 9% of the Hispanic defendants. *DOJ Supp. Survey* 9-10.

The court of appeals did not advert to the supplemental survey results, but instead relied on incomplete statistics from which the court drew inferences that are now known to be incorrect. But even without considering the additional data before the court of appeals, based solely on the record before the district court, it is clear that there was no evidence of "similarly situated" white defendants who were not charged with death-eligible offenses.

Nor does the *DOJ Survey* provide any evidence that the former Attorney General, who authorized the government to seek the death penalty against respondent, declined to authorize the death penalty for white defendants who are similarly situated to respondent. The survey shows that the former Attorney General authorized the death penalty for 71 out of 287 black capital-eligible defendants and for 44 out of 115 white capital-eligible defendants. *DOJ Survey* 24. Thus, she authorized the death penalty for a higher percentage of white defendants (38%) than black defendants (25%). *Id.* at 7. Those statistical findings do not amount to *any* showing—much less "a credible showing"—that the former Attorney General's actions had a discriminatory effect. *Armstrong*, 517 U.S. at 470.

Instead of adhering to *Armstrong*'s requirement that respondent show that similarly situated white defendants were not charged with capital-eligible offenses by

the United States Attorney or authorized for the death penalty by the Attorney General, the court of appeals seized upon a statistic unrelated to respondent's allegations of discrimination—the fact that "the United States enters plea bargains with one in two whites; it enters plea bargains with one in four blacks." App., *infra*, 12a. The *DOJ Survey* does show that 48% of white defendants authorized for the death penalty entered plea bargains while only 25% of black defendants authorized for the death penalty entered plea bargains. *DOJ Survey* 31-32. Respondent, however, has never claimed that he was not offered a plea bargain because of his race. See App., *infra*, 16a. Indeed, respondent could not make that claim because he was offered a plea bargain but declined it.[7]

Because respondent cannot allege discrimination in the plea bargaining process, and the statistics in the *DOJ Survey* refute the possibility that the former Attorney General discriminated against minorities in determining whether to authorize the death penalty, respondent's theory is reduced to a claim of discrimination in the initial charging decision by the United States Attorney. The plea bargaining statistics, however, reflect the government's interaction with defendants *after* they had already been charged with capital-eligible offenses and the Attorney General had authorized the government to seek the death penalty against them. Those statistics therefore shed no light whatsoever on whether there were white defendants similarly situated to respondent who could have been, but were not, charged with capital-eligible offenses at the outset.

[7] On May 8, 2000, respondent was scheduled to plead guilty pursuant to a plea agreement that required his cooperation, but he declined to enter the plea when he learned that his cooperation included testifying against his brothers. The government provided the court of appeals with a copy of the aborted plea agreement on the date of the oral argument in the court of appeals. See Gov't Pet. for Reh'g En Banc 2-3.

As a matter of logic, *Armstrong*'s requirement that the defendant make "a credible showing of different treatment of similarly situated persons" must demand a showing of different treatment that is *relevant* to the claim of selective prosecution that the defendant is actually making. *Armstrong*, 517 U.S. at 470. In the absence of any relevant evidence of different treatment of similarly situated persons here, *Armstrong* dictates that respondent was not entitled to discovery.

B. The Court Of Appeals' Decision Violates The Teaching Of *McCleskey* v. *Kemp*

The court of appeals' analysis in this case suffers from still another fatal flaw. In *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), this Court rejected a capital defendant's claim that a state-wide study established that the State's capital sentencing process was administered in a racially discriminatory manner. The Court concluded that a "discriminatory purpose" could not be inferred from the study's evidence of a state-wide disparate effect because the disparate effect resulted from the individualized and independent decisions of the many different prosecutors within the State. *Id.* at 295 & n.15. The Court explained that "decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations * * *. Thus, any inference from statewide statistics to a prosecutorial 'policy' is of doubtful relevance." *Ibid.*; see *id.* at 296 & n.17. The Court emphasized that a defendant must show that "the decisionmakers in *his* case acted with discriminatory purpose" in order to show intentional discrimination. *Id.* at 292.

Here, respondent produced no evidence that the United States Attorney for the Eastern District of Michigan, who made the decision to charge him with a capital-eligible offense, acted with discriminatory purpose. Nor did he produce any evidence that the former Attorney General, who authorized the government to seek the death penalty in his case, acted with discriminatory purpose. The court of appeals nonetheless found that "[t]he racial disparities identified by [respondent] in the death penalty charging phase" constituted some evidence of discriminatory purpose. App., *infra*, 13a.

The racial disparities identified by respondent in the death penalty charging phase are, however, the same sort of statistical data that the Court found insufficient in *McCleskey* to establish purposeful discrimination. The nationwide statistics on which respondent relies implicate the entire range of discretionary factors considered, individually and in isolation, by 93 separate United States Attorneys across the country, who independently decided whether or not to charge defendants with capital-eligible offenses. The statistics show that, over a five year period, those 93 United States Attorneys, independently making decisions involving infinite factual variations, collectively charged twice as many black defendants as white defendants with capital-eligible offenses. That evidence, however, does not amount to a credible showing that the United States Attorney for the Eastern District of Michigan acted with discriminatory purpose in charging respondent with a capital-eligible offense in *his* case. Nor do those statistics amount to a credible showing that the former Attorney General, who played no role at all in the charging decisions under the death penalty protocol, acted with a discriminatory purpose in authorizing the death penalty for respondent.

The court of appeals held that *McCleskey* is inapplicable here because *McCleskey* addressed a selective prosecution claim on the merits while this case is at the discovery stage. App., *infra*, 13a-14a. The difference in procedural posture, however, does not negate *McCleskey*'s fundamental teaching that a defendant must show that "the decisionmakers in *his* case acted with discriminatory purpose" in order to show intentional discrimination, 481 U.S. at 292, and that discriminatory purpose cannot be inferred from evidence of a disparate effect that results from independent decisions by multiple decision-makers. *Id.* at 295 & n.15, 296 n.17. Although, under *Armstrong*, 517 U.S. at 468, a defendant need only show "some evidence" of discrimination to obtain discovery, *McCleskey* still requires that this evidence tend to show that "the decisionmakers in *his* case acted with discriminatory purpose." 481 U.S. at 292. Respondent made no such showing here.

The court of appeals also perceived evidence of discriminatory intent at the charging stage in statements by the present and former Attorneys General and the former Deputy Attorney General that the possibility of racial bias in federal capital charging decisions warranted further study. App., *infra*, 13a-14a. As Judge Nelson pointed out in his dissent, however, expressions of concern about the national statistics in the *DOJ Survey* and of an interest in further study of the circumstances underlying some of the statistics do not support any inference that the United States Attorney for the Eastern District of Michigan acted with a discriminatory purpose when he charged respondent with capital-eligible offenses in this case. *Id.* at 16a. Moreover, the former Attorney General's call for more study to ensure that racial discrimination plays no part in the federal charging process demonstrates precisely

the opposite of evidence that she "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey*, 481 U.S. at 298 (quoting *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979)).

II. THE COURT OF APPEALS' DECISION INTRUDES ON CORE EXECUTIVE FUNCTIONS AND THREATENS UNWARRANTED AND SERIOUS DISRUPTION OF FEDERAL DEATH PENALTY PROSECUTIONS

The court of appeals' decision requires the government to produce a vast array of highly sensitive, internal deliberative documents about the Attorney General's process of reviewing capital cases. The discovery order encompasses thousands of documents relating to hundreds of cases submitted for capital review over almost six years, including the prosecution memoranda. App., *infra*, 20a-23a. Assembly and production of those documents for in camera review by the district court would be time-consuming and highly burdensome. Production of the documents would also result in substantial delay of the prosecution. "If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution." *Armstrong*, 517 U.S. at 468.

Production of the internal deliberative documents at issue here would also interfere with the prosecutorial decisionmaking process in capital cases, thus trenching on the separation of powers. The decision whether to prosecute is "a core executive constitutional function"

that "courts are 'properly hesitant to examine.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte* v. *United States*, 470 U.S. 598, 608 (1985)). As this Court has recognized, "the decision to prosecute is particularly ill-suited to judicial review" because it is based on factors that "are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607. Moreover, judicial inquiry into the prosecutorial decision "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine the prosecutorial effectiveness by revealing the Government's enforcement policy." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). Full and frank internal consideration by the Executive whether to seek the death penalty in a given case is particularly important "[b]ecause the death penalty is unique 'in both its severity and its finality.'" *Monge* v. *California*, 524 U.S. 721, 732 (1998) (quoting *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion)).

The "rigorous standard" for discovery formulated in *Armstrong* was designed to weed out unsubstantiated claims precisely in order to avoid unnecessary imposition of those undesirable consequences. 517 U.S. at 468. The court of appeals' evisceration of the *Armstrong* standard in this case presents the government with the dilemma of either accepting the disruption of the frank and orderly prosecutorial decision-making process that will result from the release of voluminous internal decision-making documents or abandoning the pursuit of the death penalty in a case in which that penalty has been authorized by Congress and determined to be appropriate by the Attorney General. Forcing the government to that choice undermines Congress's goal to ensure that defendants who commit grave crimes

like the murders respondent is alleged to have committed receive the ultimate punishment. And it simultaneously undermines the Executive's purpose in adopting the death penalty protocol—to promote consistent and even-handed application of that punishment.

Those potential adverse consequences are not limited to this case. Indeed, if the court of appeals' flawed analysis were followed by the other courts of appeals, it could ultimately put the government to the choice of forgoing the death penalty in federal prosecutions or exposing the prosecutorial decision-making process to scrutiny by district courts and defendants in a multitude of capital cases. Under the court of appeals' analysis, the statistics in the *DOJ Survey* and the public comments of DOJ officials warrant discovery on a selective prosecution claim by *any* non-white defendant in *any* federal death penalty prosecution. Thus, any federal capital defendant who is a minority would be entitled to have the notice of intent to seek the death penalty against him dismissed unless the government complied with the same discovery ordered by the district court here. The government therefore could not pursue the death penalty against *any* minority defendant unless it was prepared to comply with the discovery order. And the government could not pursue the death penalty against *only* white defendants without exposing itself to equal protection challenges by those defendants. Thus, the decision of the court of appeals, if it is allowed to stand, has the potential to disrupt all federal capital cases, thereby frustrating Congress's determination that the death penalty is an

appropriate penalty for certain extremely serious federal crimes.[8]

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[8] Outside of this case, the efforts of capital defendants to obtain discovery or to support a claim of selective prosecution based on the *DOJ Survey* have been widely rebuffed. See, *e.g.*, *United States* v. *Jones*, No. 01-10142, 2002 WL 464678, at *5-*6 (5th Cir. Mar. 27, 2002) (rejecting claim of selective prosecution absent proof that "Jones was singled out for prosecution under the FDPA but that others similarly situated were not"; emphasizing that "mere statistical evidence of racial disparity is usually *per se* insufficient to support an inference of any 'unacceptable risk of racial discrimination in the administration of capital punishment" since "criminal defendants are closely and individually scrutinized on a variety of bases"); *United States* v. *Minerd*, 182 F. Supp. 2d 459, 463-467 (W.D. Pa. 2002) (rejecting court of appeals' analysis in this case; refusing discovery because "Minerd [has] failed to produce 'some evidence' that the decision to seek the death penalty * * * was made with discriminatory purpose or that it had a discriminatory effect"); *United States* v. *Edelin*, 134 F. Supp. 2d 59, 86 (D.D.C. 2001) ("The Court will not ignore the Supreme Court's decision in *McCleskey* v. *Kemp* and find that the statistics included in the DOJ Study are sufficient evidence to support the defendant's claim of racial discrimination in the government's capital charging practices."); *United States* v. *Bin Laden*, 126 F. Supp. 2d 256, 263 (S.D.N.Y. 2000) (finding DOJ Survey did not provide evidence that defendants "have been treated differently from persons of other races who are comparably situated"). Requests for discovery to support a selective prosecution claim are not uncommon in death penalty prosecutions. See *United States* v. *Cooper*, 91 F. Supp. 2d 90, 114-116 (D.D.C. 2000); *United States* v. *Gilbert*, 75 F. Supp. 2d 12, 13-16 (D. Mass. 1999); *United States* v. *Cuff*, 38 F. Supp. 2d 282, 286-287 (S.D.N.Y. 1999); *United States* v. *Holloway*, 29 F. Supp. 2d 435, 438-442 (M.D. Tenn. 1998); *United States* v. *Roman*, 931 F. Supp. 960, 967-968 (D.R.I. 1996); *United States* v. *Nguyen*, 928 F. Supp. 1525, 1544-1545 (D. Kan. 1996); *United States* v. *DesAnges*, 921 F. Supp. 349, 357-358 (W.D. Va. 1996); *United States* v. *Walker*, 910 F. Supp. 837, 858-860 (N.D.N.Y. 1995).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the court of appeals.

Respectfully submitted.

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APRIL 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 01-1213.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN BASS, DEFENDANT-APPELLEE

Argued June 14, 2001

Decided and Filed Sept. 25, 2001.

OPINION

Before: MARTIN, Chief Judge; NELSON, Circuit Judge, RICE, Chief District Judge*

BOYCE F. MARTIN, JR., Chief Judge.

On December 8, 1998, a federal grand jury returned a second superseding indictment charging defendant John Bass with the intentional firearm killing of two individuals. Shortly thereafter, the United States filed its notice of intent to seek the death penalty on those charges. Bass moved to dismiss the death penalty

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* Hon. Walter H. Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

notice and, in the alternative, requested discovery pertaining to the United States's capital charging practices. The district court granted Bass's discovery request and, after the United States refused to comply with the order, dismissed the death penalty notice. We now affirm the district court's discovery order, and remand to allow the United States to submit the requested materials for an *in camera* review.

I.

According to a Department of Justice report, "The Federal Death Penalty System: A Statistical Survey" (September 12, 2000), all death-eligible charges brought by the United States since 1995 are subjected to the Department's death penalty decision-making procedures. Under the protocol, the individual United States Attorneys offices retain discretion in only three areas: whether to bring federal charges or defer to state prosecutions, whether to charge defendants with a capital-eligible offense, and whether to enter into a plea agreement. Otherwise, the sole power to authorize seeking the death penalty lies with the Attorney General. Once the Attorney General authorizes seeking the death penalty, the United States must file a notice of its intent to do so. *See* 18 U.S.C. § 3593(a). Each time the United States charges a defendant with a death-eligible crime, it must submit specific forms, including a recommendation on whether to seek the death penalty, a "Death Penalty Evaluation Form," and a memorandum outlining the theory of liability, the facts and evidence, including any evidence relating to any aggravating or mitigating factors, the defendant's background and criminal history, the basis for federal

prosecution and other relevant information. *See* U.S. Attys. Man. § 9-10.040.

Bass requested from the Michigan United States Attorney's office all such materials relating to his prosecution, all policies or manuals used in the Eastern District of Michigan to determine whether to charge defendants federally, and a list of all death-eligible defendants in that district since January 1, 1995, including each defendant's race, and the ultimate disposition of each case. Bass also requested all materials submitted to the Attorney General for death-eligible prosecutions between January 1, 1995 and September 1, 2000, as well as captions and case numbers of such cases, a description of the offense charged, and the ultimate disposition of the case. Finally, Bass requested all standards, policies, practices, or criteria employed by the Department of Justice to guard against the influence of race in the death penalty protocol, any correspondence between the Department of Justice and the United States Attorneys regarding such policies or requesting identification of death-eligible defendants, and a list of all nonnegligent homicide cases throughout the United States since January 1, 1995, in which one or more offenders were arrested and charged and in which the facts would have rendered the offender eligible for the death penalty. As evidence in support of his discovery motion, Bass introduced, among other studies, the Department of Justice's Survey. Bass also introduced public comments regarding the Survey made on the day of its release by then-Attorney General Janet Reno and then-Deputy Attorney General Eric Holder, as well as comments by the current Attorney General, John Ashcroft. The United States opposed Bass's motion on the grounds that the requested information was

protected by both the work-product and deliberative process privileges, that Bass had failed to make the evidentiary showing necessary to obtain further discovery, and that the requested materials were either non-existent or already in Bass's possession.

On October 24, 2000, following a hearing on Bass's motion, the district court found that he had presented sufficient evidence of racial bias in the death-penalty decision process to justify further discovery. The district court, noting that the United States did not offer any of the allegedly privileged materials for *in camera* review, further found that any privileges that may have attached to the materials were outweighed by the constitutional interests implicated by Bass's allegations and the death penalty context. Finally, it cited 18 U.S.C. § 3593(f), "Special precaution to ensure against discrimination," which requires a jury to determine that its individual members would have imposed a death sentence regardless of the defendant's race as a prerequisite to imposing such a sentence under Section 3593(e). The district court noted that for Section 3593(f) to have its intended effect of ensuring that a defendant's race plays no role in his death sentence, discovery of the sort requested by Bass must be allowed.

The United States refused to comply with the discovery order. On January 10, 2001, the district court sanctioned the United States by dismissing its notice of intent to seek the death penalty. The United States timely appealed.

II.

As an initial matter, we agree with the United States that we have jurisdiction to review the district court's

pre-trial discovery order because that court's dismissal of the death penalty notice constitutes a final, appealable order under 18 U.S.C. § 3731. Under Section 3731, "an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information. . . ." We have previously allowed the United States to appeal, under Section 3731, pre-trial discovery rulings. *See, e.g., United States v. Presser*, 844 F.2d 1275, 1280 (6th Cir. 1988). In *Presser*, we exercised jurisdiction over the United States's appeal from an order granting a defendant's discovery request because the district court indicated that if the United States failed to comply, it would suppress the relevant evidence, which would likely result in dismissal of the indictment. Here, the United States's failure to comply with the district court's discovery order resulted in dismissal of the death penalty notice—in effect, a partial dismissal of the charge. Accordingly, we find that, as in *Presser*, we have jurisdiction to hear the United States's appeal from the district court's pre-trial discovery order, and will now proceed to the merits of its argument.

III.

"It is well established that the scope of discovery is within the sound discretion of the trial court." *United States v. One Tract of Real Property*, 95 F.3d 422, 427 (6th Cir. 1996) (citations and internal punctuation omitted). We thus review a district court's discovery order in a criminal case for an abuse of discretion. *See United States v. Kincaide*, 145 F.3d 771, 780 (6th Cir. 1998). Under this standard, "the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place, but rather,

whether any reasonable person could agree with the district court." *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 511 (6th Cir. 1998).

The United States argues that Bass's evidence in support of his discovery request, including the Department of Justice's Survey and the Department officials' statements, did not constitute sufficient evidence of selective prosecution to warrant discovery. Accordingly, it contends that the district court abused its discretion in ordering the United States to produce the relevant documents. Bass does not dispute that the evidence he presented to the district court was insufficient to constitute a prima facie case of selective prosecution. He does, however, argue that the evidence was sufficient to warrant further investigation through discovery.

To make out a claim of selective prosecution, a defendant must show both a discriminatory effect and a discriminatory purpose or intent. *See United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996). In *Armstrong*, the Supreme Court discussed the threshold showing a criminal defendant must make in order to obtain discovery on a selective prosecution claim. *See id.* at 463, 116 S. Ct. 1480. The Supreme Court noted that "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Armstrong*, 517 U.S. at 464, 116 S. Ct. 1480 (citations omitted). Accordingly, "the showing necessary to obtain discovery [in a selective prosecution case] should itself be a significant barrier to the litigation of insubstantial claims." *Id.* *Armstrong*'s plain language requires only that a defendant must present "some evidence tending to show the existence of the discriminatory effect element." *Id.* at 469, 116 S. Ct. 1480 (citations and internal punctuations omitted). Nonetheless, we have read *Armstrong* to require some evidence of the discriminatory intent element as well. *See United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998). To establish discriminatory effect, a defendant "must show that similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465, 116 S. Ct. 1480. As an example of "some evidence" showing a "discriminatory effect on blacks as compared to similarly situated whites," *Armstrong* cited a statistic showing that blacks were "at least 1.7 times as likely as whites" to have a state's disenfranchisement law applied to them. *Id.* at 467, 116 S. Ct. 1480 (citing *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916, 85 L.Ed.2d 222 (1985)). To establish discriminatory intent, a defendant must show that the prosecutorial policy "was motivated by racial animus." *Jones*, 159 F.3d at 976-77.

A. Bass's Evidence

Through the Department of Justice's Survey and other statistical evidence, Bass presented the following evidence tending to show that selective prosecution taints the death penalty protocol. First, the Survey showed a significant difference between the percentage of white and black prisoners in the general federal prison population (white: fifty-seven percent; black: thirty-eight percent) and those charged by the United States with death-eligible crimes (white: twenty percent; black: forty-eight percent). Of the seventeen defendants charged with a death-eligible crime in the Eastern District of Michigan, none were white and fourteen were black (the other three were Hispanic).

Second, the Survey showed that the United States entered into a plea bargain with forty-eight percent of the white defendants against whom it sought the death penalty, compared with twenty-five percent of similarly situated black defendants. The United States entered into plea agreements with twenty-eight percent of Hispanics, and twenty-five percent of other non-white defendants.

Third, the Survey showed that two of the three death-eligible offenses charged most frequently against whites and blacks were the same, but that the percentages by race of those charged with each crime were vastly different. Sixteen percent of death-eligible whites were charged with firearms murder, compared with thirty-two percent of death-eligible blacks. Fifteen percent of death-eligible whites were charged with racketeering murder, compared with twenty-two percent of death-eligible blacks. The Survey noted that firearms murder, racketeering murder, and continuing criminal enterprise murder (the three charges brought most frequently against death-eligible blacks) "can be charged in a wide array of circumstances, and [are] therefore more likely to be available as a charging option in a given case than more narrowly defined offenses such as kidnaping-related murder." However, death-eligible whites were most often charged with murder within a federal jurisdiction (twenty-one percent of all death-eligible whites).

Bass also introduced other statistics indicating that blacks are no more likely to commit violent federal offenses than whites. For instance, the United States Sentencing Commission's statistics for 1999 (the most recent statistics currently available) show that twenty-eight percent of people sentenced for federal murder

were white, while eighteen percent were black. *See* 1999 Sourcebook of Federal Sentencing Statistics. In fact, there were only four federal offense categories where whites comprised twenty percent or less of the total defendants sentenced. The Commission's 1999 sentencing statistics reflect three of them: manslaughter (whites: seventeen percent; blacks: eleven percent), sexual abuse (whites: eighteen percent; blacks: seven percent), and immigration (whites: four percent; blacks: four percent). The Survey reflects the fourth: death-eligible defendants (whites: twenty percent; blacks: forty-eight percent). In contrast, the only federal offense reflected in the 1999 sentencing statistics where blacks represented forty-eight percent or more of the total defendants sentenced was robbery (blacks: forty-eight percent; whites: forty-one percent). In the few non-death-eligible offense categories in which blacks actually constituted a higher percentage of total offenders sentenced than whites, none reflected a statistical racial disparity comparable to the disparity reflected by the Survey for death-eligible charges.

In addition to the statistical evidence, Bass introduced public comments made on the Survey's release date by then-Attorney General Reno and then-Deputy Attorney General Holder who expressed concern over the significant racial disparities uncovered by the Survey. For instance, Holder commented:

> I can't help but be both personally and professionally disturbed by the numbers that we discuss today. To be sure, many factors have led to the disproportionate representation of racial and ethnic minorities throughout the federal death penalty process. Nevertheless, no one reading this report

can help but be disturbed, troubled, by this disparity.

In response to another question, Holder tacitly recognized that the Survey's results implicate the very concerns forming the basis of Bass's selective prosecution claim: "I'm particularly struck by the facts that *African-Americans and Hispanics are over-represented in those cases presented for consideration of the death penalty*, and those cases where the defendant is actually sentenced to death." (emphasis added). Reno also expressed concern over the Survey's results, even while acknowledging the various non-racial factors that could affect them: "So in some respects I'm not surprised [by the racial disparities], but I continue to be sorely troubled."[9] While cautioning that intentional racial bias could not fairly be inferred simply as a result of the numbers, Reno emphatically endorsed future studies to determine whether the disparities were shaped, in part, by racial animus: "More information is needed to better understand the many factors that affect how homicide cases make their way into the federal system and, once in the federal system, why they follow different paths. *An even broader analysis must therefore be undertaken to determine if bias does in fact play any role in the federal death penalty system*" (emphasis added). Therefore, the top Department of Justice officials have taken the position that, although the Survey's results do not conclusively show intentional racial bias, neither do they conclusively show the lack of bias. Rather, in Reno's and Holder's

[9] During his confirmation hearings, John Ashcroft expressed similar concern over the Survey's results, stating that the evidence of racial disparity in the federal death penalty "troubled [him] deeply."

view, the results demonstrate a clear racial disparity and raise questions warranting further study to determine whether that disparity is caused by intentional racial discrimination.

B. Discriminatory Effect

Bass's evidence shows the same type of statistical disparity the Supreme Court previously approved of in both *Hunter* and *Armstrong* as "indisputable evidence" of a law's discriminatory effect. For example, the evidence shows that although whites make up the majority of all federal prisoners, they are only one-fifth of those charged by the United States with death-eligible offenses. The United States charges blacks with a death-eligible offense more than twice as often as it charges whites. *Cf. Armstrong*, 517 U.S. at 467, 116 S. Ct. 1480 (citing evidence in *Hunter* as example of type of proof needed to obtain discovery in selective prosecution claim); *Hunter*, 471 U.S. at 227, 105 S. Ct. 1916 (citing single statistic showing blacks at least 1.7 times as likely as whites to have challenged state law applied to them). In addition, the United States charges blacks with racketeering murder one-and-a-half times as often as it charges whites, and with firearms murder (Bass's charge) more than twice as often as it charges blacks. Among death penalty defendants, the United States enters plea bargains with whites almost twice as often as it does with blacks. Under the "1.7 times" standard approved of in *Armstrong*, then, the statistics presented by Bass constitute sufficient evidence of a discriminatory effect to warrant further discovery as a matter of law.

The United States concedes that the Survey shows a statistical disparity at the charging stage, but argues that Bass's evidence does not satisfy the "similarly

situated" requirement because Bass has failed to identify white defendants who could have been charged with death-eligible crimes but were not. We find, however, that with the plea bargaining statistics, Bass has identified a pool of similarly situated defendants—those whose crimes shared sufficient aggravating factors that the United States chose to pursue the death penalty against each of them. Of those defendants, the United States enters plea bargains with one in two whites; it enters plea bargains with one in four blacks. Therefore, the United States's assertion that Bass has failed to show a discriminatory effect on similarly situated whites and blacks is simply wrong.

Of course non-discriminatory reasons may explain such glaring discrepancies, but Bass need not address any of them at this pre-discovery stage. The current death penalty protocol leaves only three areas where the United States Attorneys can exercise discretion (and, of course, it is the manner in which that discretion is exercised that forms the basis of Bass's claim): bringing federal charges, bringing death-eligible charges, and plea bargaining. In the two areas addressed by the Survey—bringing death-eligible charges and plea bargaining—the racial disparities are clear. Viewing the totality of Bass's evidence, the district court did not abuse its discretion in finding that the statistical disparities are, at the least, some evidence tending to show the death penalty protocol's discriminatory effect warranting discovery.

C. Discriminatory Intent

With regard to the discriminatory intent element, we again find that Bass presented some evidence tending to show that the United States considers the defendant's race when determining whether to charge him or

her with a death-eligible offense. The racial disparities identified by Bass in the death penalty charging phase do not occur in any non-death-eligible federal offenses. Therefore, they suggest that a defendant's race does play a role during the death penalty protocol. The Department of Justice's officials' comments bear this out. As Bass states in his brief, "[t]he precise point made by the Attorneys General and the former Deputy Attorney General is that they are deeply troubled *because* race may be systemically biasing federal capital charging, and that they need more information to know for sure" (emphasis added). If the Department of Justice's official position is that these statistics, standing alone, show sufficient evidence of the possibility of racial animus to warrant further study, we cannot fairly deny Bass the same opportunity to investigate when he has introduced not only the Survey, but several other statistics showing that the grave racial disparities identified by the Survey are unique to the death penalty protocol.

The United States attempts to preclude us from drawing any inference of intentional race discrimination from Bass's statistics by arguing that *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987), prohibits such inferences. *McCleskey* held that statistics showing the discriminatory effect of a state's death penalty procedure do not, without more, constitute proof of a discriminatory intent. *See id.* at 294-95, 107 S. Ct. 1756. In *McCleskey*, however, the Supreme Court, sitting in federal habeas review, was addressing whether the defendant had carried his burden of proof on the merits of his selective prosecution claim. In contrast, we must determine only whether Bass has shown "some evidence tending to show the existence of

. . . discriminatory intent" sufficient to warrant discovery. *Jones*, 159 F.3d at 978 ("Obviously, a defendant need not prove his case in order to justify discovery on an issue."). *McCleskey* will certainly preclude Bass's selective prosecution claim if, at the end of discovery, he fails to show any additional evidence that the United States intentionally discriminates against blacks through the death penalty protocol. It does not, however, pose any bar to Bass at this preliminary stage. Here as weil, the United States has failed to show that the district court abused its discretion in ordering discovery on the grounds that the stark discriminatory effect of the federal death penalty protocol, coupled with the Department of Justice's official statements recognizing the possibility of intentional discrimination in light of the protocol's discriminatory effect, presents some evidence tending to show that race in fact plays a role in the United States's decision-making process.

IV.

We can dispose of both parties' remaining arguments relatively easily. The United States argues that the district court abused its discretion by citing 18 U.S.C. § 3593(f) as an alternative ground for its discovery order. The United States is correct. That statute, by its plain language, requires only that each jury member swear that he or she voted to impose the death penalty without regard to improper considerations, including the defendant's race. Jury members are simply not responsible for also asserting that the defendant was not *prosecuted* because of his or her race. Questions regarding the prosecution's motivation are more properly addressed in the type of selective prosecution

claim Bass presents. Section 3593(f) does nothing to grant him a right to either obtain discovery or present evidence to a jury regarding alleged discrimination in the prosecution, and the district court abused its discretion in holding otherwise. Nonetheless, because we affirm the district court's discovery order on other grounds, our decision to reverse the district court on this issue does not effect the outcome of this appeal.

Second, the United States argues that the requested items are either not relevant, non-existent, or already in Bass's possession. The district court indicated that it would hear from the United States as to the unavailability or irrelevancy of particular documents, but the United States chose instead to refuse to comply with the entire order. That refusal also prohibited the district court from reviewing the requested documents to determine whether the United States' claimed privileges applied to any of them. Therefore, we find the record insufficiently developed to allow us to assess the merits of the United States's arguments relating to the content of the requested documents. Because of this, and because we think the district court should have the opportunity to review each requested item's relevancy and privileged status in the first instance, we remand to the district court with instructions to allow the United States to produce the documents for an *in camera* review. If the United States again fails to comply, the district court remains free to impose whatever sanction it deems appropriate under the circumstances.

V.

For the foregoing reasons, we AFFIRM the district court's discovery order, and REMAND for further proceedings consistent with this opinion.

NELSON, Circuit Judge, concurring in part and dissenting in part.

I concur generally in Parts I and II of the court's opinion, as well as in the first paragraph of Part IV, but I would reverse the dismissal of the death penalty notice on the ground that defendant Bass failed to make the threshold showing necessary for issuance of the discovery order he sought.

As Bass acknowledges in his brief, the racial disparities of which he complains "are generated primarily at the early stages of federal capital cases. * * * [T]he major problem seems to occur in the initial selection of cases for federal prosecution on capital-eligible charges." The Department of Justice Statistical Survey on which Bass relies refutes any inference that the Attorney General—who is not required by Department of Justice procedures personally to authorize the bringing of capital-eligible cases—has been guilty of racial discrimination against African Americans. The survey shows that Attorney General Janet Reno personally authorized U.S. Attorneys to file death penalty notices against a higher percentage of white capital-eligible defendants (38 percent) than black capital-eligible defendants (25 percent).

Just as Bass is not challenging the personal *bona fides* of the Attorney General who authorized the filing of a death penalty notice in his case, as I understand it, he is not alleging that the office of the U.S. Attorney for the district where his case is pending—the Eastern District of Michigan—declined to negotiate a plea bargain with him because of his race. At bottom, rather, his quarrel seems to be with the decision of the U.S. Attorney's Office to bring federal death-eligible charges against him in the first place. And he cannot

prevail on this point, ultimately, without demonstrating that the U.S. Attorney's charging policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996), quoting *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L.Ed.2d 547 (1985). The standard, as the *Armstrong* court observed, "is a demanding one." *Id.* at 463, 116 S. Ct. 1480.

To obtain the discovery he sought here, Bass was required to produce "some evidence" in support of both elements of his selective prosecution defense. See *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998). This standard is itself a "rigorous" one, see *Armstrong*, 517 U.S. at 468, 116 S. Ct. 1480, and in my judgment Bass failed to meet it.

Statistically, it is true that most of the capital-eligible prosecutions in the Eastern District of Michigan have been brought against African Americans. It is difficult for me to see how this datum constitutes even "some" evidence of discriminatory effect, however, given what I take to be the complete absence of any evidence that the U.S. Attorney's Office failed to initiate capital-eligible prosecutions against individuals whose situations were similar to that of Mr. Bass but whose race was different. "To establish a discriminatory effect in a race case," *Armstrong* confirms, "the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* at 465, 116 S. Ct. 1480. And to obtain discovery in this connection, there must be a "credible showing of different treatment of similarly situated persons." *Id.* at 470, 116 S. Ct. 1480.

Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 1916, 85 L.Ed.2d 222 (1985), which was distinguished in

Armstrong and on which my colleagues on the panel rely heavily here, was a case in which the State of Georgia had adopted a constitutional provision disenfranchising persons convicted of crimes involving moral turpitude. There was direct evidence that the state's purpose had been to deny the vote to blacks. See *Hunter*, 471 U.S. at 229-31, 105 S. Ct. 1916; *Armstrong*, 517 U.S. at 467, 116 S. Ct. 1480. The provision had a racially disparate impact in practice, disenfranchising blacks at least 1.7 times as often as whites—and in this context the *Hunter* court concluded that under the analysis of *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977), and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977), there had been a denial of equal protection of the laws. *Hunter*, 471 U.S. at 233, 105 S. Ct. 1916.

The defendant in *Armstrong* argued that *Hunter* "cut against any absolute requirement that there be a showing of failure to prosecute similarly situated individuals." *Armstrong*, 517 U.S. at 467, 116 S. Ct. 1480. The *Armstrong* court rejected this argument, noting that the persons adversely affected by Georgia's constitutional provision were all "similarly situated;" the holding in *Hunter* was thus "consistent with ordinary equal protection principles, including the similarly situated requirement." *Id.*

The reason that the members of the pool of people disenfranchised by the Georgia constitutional provision were "similarly situated," I take it, was that all of them—black and white—had been convicted of crimes of moral turpitude. In the case before us here, by contrast, there is simply no evidence of any white

person being in a situation comparable to Bass' and not being prosecuted.

More importantly, perhaps, there is no evidence here of a racially discriminatory motive corresponding to the improper motives of which there was direct evidence in both *Hunter* and *Jones*. The fact that top Justice Department officials have expressed concern over some of the national statistics does not, in my view, constitute "evidence" that capital-eligible charges were brought against Bass because of his race and not simply because there is probable cause to believe that he is responsible for a series of murders committed to protect his drug business.

In my view the district court's decision to grant discovery was unwarranted as a matter of law, and the dismissal of the death penalty notice was thus an abuse of discretion. Insofar as the court holds otherwise, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 97-CR-80235

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN BASS, DEFENDANT

ORDER GRANTING DISCOVERY OF INFORMATION PERTAINING TO THE GOVERNMENT'S CAPITAL CHARGING PRACTICES

[Filed: Oct. 26, 2000]

At a session of said court, held
in the U.S. District Court, Eastern
District of Michigan Southern Division
on OCT 26, 2000

PRESENT: HON. ARTHUR J. TARNOW
U.S. District Court Judge

Defendant John Bass' request for discovery contained within this Motion to Dismiss the Prosecution's Request for the Death Penalty Because of Racial Discrimination, and for Discovery of Information Pertaining to the Government's Capital Charging Practices is **GRANTED.**

IT IS HEREBY ORDERED that the Government provide Defendant John Bass the following information and documents for inspection and copying to the defense within thirty days:

1. All correspondence from the office of the U.S. Attorney for the Eastern District of Michigan regarding the decision to seek the death penalty against Mr. Bass, including but not limited to:

   A. the "Death Penalty Prosecution Memorandum" as described at §73 of the Department of Justice Criminal Resource Manual;

   B. the "Death Penalty Evaluation Form for Homicides under titles 8, 18, and 49" and all attached memoranda as described at §74 of the Department of Justice Criminal Resource Manual;

   C. the "Non-decisional Case Identifying Information" form identifying the race of defendant and victims as described at §74 of the Department of Justice Criminal Resource Manual;

   D. the "Death Penalty Evaluation Form for Killings under Title 21" as described at § 75 of the Department of Justice Criminal Resource Manual; and

   E. the "Non-decisional Case Identifying Information" form identifying the race of defendant and victims as described at §75 of the Department of Justice Criminal Resource Manual.

2. Captions and case numbers of all cases submitted to capital case review in the United States between January 1, 1994 and September 1, 2000 with a description of the offense(s) charged and the ultimate disposition of the case.

3. All standards, policies, practices or criteria employed by the Department of Justice to guard against the influence of racial, political, or other arbitrary or invidious factors in the selection of cases and defendants for capital prosecution.

4. For each of the cases identified in item two (2) above, the following information.

A. the "Death Penalty Prosecution Memorandum" as described at §73 of the Department of Justice Criminal Resource Manual:

B. the "Death Penalty Evaluation Form for Homicides under titles 8, 18, and 49" and all attached memoranda as described at §74 of the Department of Justice Criminal Resource Manual;

C. the "Non-decisional Case Identifying Information" form identifying the race of defendant and victims as described at §74 of the Department of Justice Criminal Resource Manual;

D. the "Death Penalty Evaluation Form for Killings under Title 21" as described at §75 of the Department of Justice Criminal Resource Manual; and

E. the "Non-decisional Case Identifying Information" form identifying the race of defendant and victims as described at § 75 of the Department of Justice Criminal Resource Manual.

5. Any correspondence from the Department of Justice to United States Attorneys and their staff between January 1, 1994 and the present regarding federal death penalty policies, procedures, and selection criteria or requesting identification of cases for capital prosecution under federal law.

6. All policies or practice manuals used by the United States Attorney in the Eastern District of Michigan regarding the factors determining whether to charge defendants under Michigan or federal law.

7. A list of all death-eligible indictments originating in the Eastern District of Michigan since January 1, 1994, the race of the defendant, and the ultimate disposition of the cases.

8. A list of any cases known to the Justice Department or to the FBI in which at least one defendant was arrested and charged by state or federal law enforcement authorities, and in which the facts an arrested defendant would have been charged with a capital crime under 18 U.S.C. § 3591, 21 U.S.C. § 848, or 21 U.S.C. § 924(j).

IT IS SO ORDERED this 26 day of October 2000.

ARTHUR J. TARNOW
HONORABLE ARTHUR J. TARNOW
U.S. District Court Judge

Approved as to Form:

/s/ MIKE LEIBSON
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 97-80235-91

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN BASS, DEFENDANT

[Filed: Dec. 20, 2000]

ORDER DENYING GOVERNMENT'S MOTION FOR RECONSIDERATION [769-1]

On November 9, 2000, the Government filed a motion for reconsideration of the Court's order granting discovery of information pertaining to the Government's capital charging practices to which the defendant responded.

The parties have not articulated any new information, or argument. Therefore, the basis for the order stated on the record at the hearing before this Court on October 20, 2000 remains valid.

Based on the October 20, 2000 hearing and the subsequent pleadings to reconsider: IT IS ORDERED that the Government's motion for reconsideration [769-1] is DENIED.

ARTHUR J. TARNOW
ARTHUR J. TARNOW
United States District Judge

Date: DEC. 20, 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 97-80235

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN BASS, DEFENDANT

ORDER DISMISSING THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY

On January 9, 2000, the defendant filed a motion to dismiss the capital count against him based on the Government's failure to comply with this Court's order granting discovery. This Court entered an order granting John Bass's Motion for Discovery of Information Pertaining to the Government's Capital Charging Practices on October 12, 2000. The order gave the Government 30 days to comply. The Government filed a motion to reconsider which this Court denied on December 20, 2000.

Based on Government representations that the October discovery order would not be complied with, the elapsing of the compliance time mandated by the October order, and all relevant information:

IT IS ORDERED that the notice to seek the death penalty is DISMISSED.

ARTHUR J. TARNOW
ARTHUR J. TARNOW
United States District Judge

Date: JAN 10, 2001

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1213

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN BASS, DEFENDANT-APPELLEE

[Filed: Sept. 25, 2001]

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit

JUDGMENT

Before: MARTIN, Chief Judge; NELSON, Circuit Judge; RICE, Chief District Judge.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's discovery order is AFFIRMED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-1213

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN BASS, DEFENDANT-APPELLEE

[Filed: Dec. 7, 2001]

ORDER

Before: MARTIN, Chief Judge; NELSON, Circuit Judge; RICE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original sub-

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* Hon. Walter H. Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

mission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN [Illegible]
LEONARD GREEN, Clerk

No. 01-1471 (2)

JUN 3 2002

CLERK

In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

JOHN BASS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals exceed its jurisdiction by entertaining a Government appeal in a criminal case from a pre-trial order dismissing the prosecution's notice of intent to seek the death penalty, in the absence of any statutory authority for an appeal from such an order?

2. Did the court of appeals properly affirm the district court's finding that the defendant was entitled to discovery in support of his claim of discriminatory prosecution because he had presented "some evidence" of the existence of the elements of that claim?

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PROCEDURAL HISTORY

On August 19, 1997, Respondent John Bass was arrested pursuant to a federal indictment charging him with conspiracy to distribute crack cocaine in the Northern District of Ohio, in violation of 21 U.S.C. § 846 and § 841(b)(1)(A). On October 29, 1998, Mr. Bass was arraigned for conspiracy to distribute crack cocaine, in violation of 21 U.S.C. § 846, in the Eastern District of Michigan; one week later the Ohio charges were adjourned without date and later dismissed. On December 9, 1998, a second superceding indictment was filed in the Eastern District of Michigan, charging Mr. Bass and thirteen co-defendants, in addition to various drug charges, with multiple counts of intentional killing and firearms murder in the course of drug trafficking, in violation of 21 U.S.C. § 921(j). On August 13, 1999, Attorney General Janet Reno authorized the United States Attorney for the Eastern District of Michigan to seek the death penalty against Mr. Bass only.

In the three-and-a-half years since December, 1998, the Government has dismissed the charges against or entered into plea agreements with all thirteen of the other defendants named in the second superceding indictment, leaving only Respondent John Bass. On May 7, 2000, Respondent was in the midst of entering a guilty plea pursuant to Rule 11 of the Federal Rules of Criminal Procedure when a misunderstanding surfaced regarding the terms of his plea agreement with the Government. The district court adjourned the plea until May 10, 2000, to give Mr. Bass time to confer with counsel. Instead, on May 10, the district court was informed that an extraordinary breach of security had put Mr. Bass's safety at risk: Information that he had given to the Government in

confidence in the course of his plea negotiations had been provided, in writing, to another prisoner in the same detention facility who had been arrested on the basis of information provided by Respondent. As a result, the plea was aborted.[1]

On September 8, 2000, Respondent filed a motion to dismiss the notice of intent to seek the death penalty in his case because of racial discrimination, and for discovery of information relevant to that issue. On October 16, 2000, he filed a supplemental memorandum in support of those motions, providing the district court with copies of a study of the federal death penalty that was released by the Department of Justice on September 12 of that year (the "DOJ Study"), and of a transcript of a press conference by then Attorney General Janet Reno and Deputy Attorney General Eric Holder on the release of the DOJ Study. After argument on October 24, 2000, the district court granted

[1] Specifically, on May 10, 2000, Mr. William Daniel, one of Mr. Bass's appointed attorneys, informed the court that when he went to visit Mr. Bass on May 8 he found him visibly shaken because he had just seen another prisoner who had told him that he knew that Mr. Bass had provided the information that led to the arrest of that prisoner and of his wife. Mr. Bass denied this charge. In response, the other prisoner sent a copy of an FBI "302" interview form to Mr. Bass, via a guard, while Mr. Bass was conferring with Mr. Daniel. The FBI "302" form reported information that Mr. Bass gave about that prisoner, in strict confidence, as part of his pending plea bargain with the Government. Mr. Daniel produced the copy of the "302" form in court. The district court responded to this information in the strongest terms (e.g., "It is just beyond my imagination."), expressed concern about Mr. Bass's physical security, refused to proceed with the Rule 11 proceeding, and – while stating his complete confidence in the integrity of the prosecutors handling the case – requested a formal investigation. A motion to dismiss based on these events was filed in district court on April 23, 2001, and is pending. *See* Appendix A to Respondent's Memorandum in Opposition to Petition for Rehearing En Banc.

Respondent's discovery motion; at that hearing, the Government indicated that it would not comply with the discovery order. The Government's motion for reconsideration was denied on December 20. On January 10, 2001 – after the Government again informed the court that it would provide no information in response to the discovery order, in any form – the district court entered an order dismissing the notice of intent to seek the death penalty for Mr. Bass. The Government filed a notice of appeal on February 26, 2001.

After oral argument on June 14, 2001, the Sixth Circuit affirmed the district court's discovery order on September 25, 2001.[2] The circuit court remanded the case to the district court for further proceedings on issues of privilege, relevance, and undue burden that could not be addressed either by the district court or on appeal because the Government had refused to produce any documents for the trial judge's consideration, *in camera* or otherwise. On October 9, 2001, the Government filed a petition for

[2] On June 8, 2001 – six days before oral argument – the Government submitted to the Sixth Circuit a new report on the federal death penalty that had been released by the Department of Justice two days earlier, on June 6 (the "Ashcroft Report"), together with testimony by Attorney General John Ashcroft before the House Judiciary Committee, also on June 6. These documents were purportedly submitted under F.R. Crim. P. 28(j) which permits a party to submit citations to legal authorities that have come to the party's attention after briefing. Respondent filed a letter in response pointing out that F.R. Crim. P. 28(j) contemplated the submission of *citations*, not documents, to *legal authorities*, not evidence, and requesting permission to file a supplemental memorandum in response. On June 13, at the request of the Sixth Circuit, Respondent filed a supplemental memorandum addressed to the Government's submission.

rehearing en banc,[3] which was denied on December 7.[4] In late February, 2002, the Government requested and received an extension of the period to file its petition for certiorari until April 6, 2002.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. THE COURT LACKS JURISDICTION TO REVIEW THIS CASE ON CERTIORARI BECAUSE, CONTRARY TO THE DECISION OF THE COURT OF APPEALS, THE GOVERNMENT LACKED STATUTORY AUTHORITY TO APPEAL THE DISTRICT COURT'S ORDER

The law is clear that "the Government [may] not take an appeal in a criminal case without express statutory authority." *United States v. Wilson*, 420 U.S. 332, 336 (1974), citing *United States v. Sanges*, 144 U.S. 310 (1892).

[3] At oral argument on June 14, 2001, the Government had stated that Respondent voluntarily rejected a plea bargain because it required him to testify against his brothers, and the Chief Judge criticized the Government for referring to matters outside the record. Following the argument, the Government lodged with the court a copy of the aborted plea agreement between Mr. Bass and the Department of Justice, but provided no record of the district court proceedings surrounding that plea bargain, on May 7 and May 10, 2000. *See supra*, note 1. The Government also attached a copy of the plea agreement to its Petition for Rehearing En Banc, but again provided no information on the Rule 11 hearings at which the plea bargain fell apart.

[4] On November 5, 2001, pursuant to F.R.A.P. 35(e), the circuit court requested a Memorandum in Opposition to the Petition for Rehearing En Banc, which was filed by Respondent on November 13, 2001 (and which did provide the court with a transcript of the Rule 11 hearings on May 7 and 10, 2000).

In this case the Government purported to rely on 18 U.S.C. § 3731. But § 3731 nowhere authorizes the Government to appeal the sort of district court order at issue here, which was an order dismissing the Government's notice of intent to seek the death penalty, and not – as specified by the explicit text of the statute defining what orders are appealable – an order "dismissing an indictment or information . . . as to any one or more counts." In the absence of authority to appeal, this Court has no jurisdiction to consider the case on certiorari because this is not a case "*in* the court[] of appeals" as required by 28 U.S.C. § 1254 (emphasis added).[5]

The text of the relevant portion of 18 U.S.C. § 3731 is unambiguous:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court *dismissing an indictment* or information or granting a new trial after verdict or judgment, *as to any one or more counts*, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

[5] *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 734 (1981): "[W]e conclude that petitioner did present [an] . . . appealable question to the Court of Appeals. It follows that the case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction."

Id. (Emphasis added.) To state the obvious: 18 U.S.C. § 3731 does not provide express authority for an appeal in this case because the district court's order did not dismiss the indictment against Mr. Bass, or any count of the indictment, or any portion of any count. It did not alter the indictment by a single word. The statute could only possibly provide such authority if the notice of intent to seek the death penalty were *a part of the indictment*. But that is plainly false. The notice of intent was not included in the indictment, and it was not issued by the grand jury, the judicial body that returned the indictment. It was instead a notice of a decision by the executive branch, made by the Attorney General more than eight months after the second superceding indictment against Mr. Bass was filed.

In *United States v. Wilson*, 420 U.S. at 338, this Court stated:

> While the language of the new Act [18 U.S.C. § 3731] is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.

This statement in *Wilson*, however, speaks to an aspect of the statute's reach that has no bearing on the issue presented by the Government's attempted appeal in the present case. The district court order at issue in *Wilson* was a dismissal of an *indictment*, a type of order which § 3731 does expressly permit the Government to appeal. The pertinent issue in *Wilson* was whether the current version of § 3731 imposed any non-constitutional restrictions on Government appeals from dismissals based on the *grounds* on which the district court dismissed the

indictment; the Court held that it does not.[6] The Court had no occasion in *Wilson* to consider whether this statute authorizes an appeal when there has been no dismissal of an indictment at all. Nor have there have been any decisions from this Court since *Wilson* that apply § 3731 in the present context.

On the question of statutory interpretation at issue here, there should be no occasion to resort to legislative history (or any other secondary sources of authority) since the meaning of the statute is plain: it permits an appeal from a dismissal of a grand jury indictment, or a portion of

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[6] In *Wilson* the Court reviewed a Third Circuit opinion, 492 F.2d 1345 (1973), that disallowed a Government appeal on the authority of *United States v. Sisson*, 399 U.S. 267 (1970). *Sisson* itself was the last of a long line of cases dating back to *Sanges, supra*, construing and often criticizing the predecessor to the current statute, which made the Government's right to appeal turn on elaborate and murky distinctions between the *grounds* for the district court's action. Thus, for example, in *Sisson*, Justice Harlan commented for the Court:

> Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case. When judged in these terms, the Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility, the Criminal Appeals Act proved a most unruly child that has not improved with age.

399 U.S. at 307. The present statute was passed by Congress in 1970, the same year as *Sisson*, and eliminated the complex structure that had evolved under the prior Act. Instead, § 3731 provides that certain categories of orders may be appealed – including dismissals of indictments – unless the double jeopardy clause prohibits further prosecution.

an indictment, and not otherwise.[7] As this Court has emphasized:

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992).

For the most part, circuit court cases applying § 3731 are consistent with the plain meaning of the statute. There are several cases, for example, that hold that dismissal of a portion of a count is appealable as an order dismissing a "count," because, among other reasons, the division of charges into separate counts is often arbitrary.[8] In other cases, courts of appeals have addressed the range

[7] The Court has had occasion to interpret the term "dismissal" in this context. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 567 n.4 (1977), the Court held that a judgment of acquittal under F.R. Crim. P. 29(c) – an order that terminates a prosecution under an indictment – should be considered a "dismissal" for the purposes of § 3731. But there has been no uncertainty as to the meaning of "indictment" – it is the charging instrument issued by the grand jury. *See, e.g.*, F.R. Crim. P. 6(f): "A *grand jury* may indict only upon the concurrence of 12 or more jurors. The indictment shall be returned *by the grand jury* . . . ."

[8] *See, e.g., United States v. Martin*, 733 F.2d 1309, 1310 (8th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1003, 105 S. Ct. 1864, 85 L. Ed. 2d 158 (1985); *United States v. Margiotta*, 662 F.2d 131, 139-41 (2d Cir. 1981) (*Margiotta II*); *United States v. Levasseur*, 846 F.2d 786, 788 (1st Cir. 1988). On the other hand, circuit courts have held that orders are not appealable where the dismissed portion of a count did not provide a "discrete basis for the imposition of criminal liability." *See, e.g., United States v. Tom*, 787 F.2d 65, 68-71 (2nd Cir. 1986).

of types of orders that may constitute "dismissal" of the indictment, or of part of it.[9] When courts must decide whether, for the purposes of this statute, an order amounts to a "dismissal," or whether a portion of an indictment constitutes a "count," it is appropriate to give effect to the statutory provision that "this section shall be liberally construed to effectuate its purposes." But that language does not create "explicit statutory authority" to appeal when a basic statutory requirement for appellate jurisdiction is entirely absent.[10]

The Sixth Circuit opinion in the present case, like a few similar decisions in other circuits,[11] is flatly inconsistent with the plain meaning of § 3731. In *United States v. Woolard*, 981 F.2d 756, 757 (5th Cir. 1993), for example, the Fifth Circuit held that a district court's dismissal of the Justice Department's notice of intent to seek the death penalty "was in every practical way as much of an alteration of the grand jury's charge as the striking of predicate acts of forfeiture. . . ." Apparently the court of appeals overlooked the fact that a notice of intent to seek the death penalty is not a part of the grand jury's charge at all.

[9] *See, e.g, United States v. Margiotta*, 646 F.2d 729, 732 (2nd Cir. 1981) (*Margiotta I*) (order requiring an election between allegation amounted to a dismissal of the allegations not elected).

[10] This does not deprive the government of any pre-trial remedy. In *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1966), for example, "the government itself . . . suggested dismissal of the indictments to the district court so that an appeal might lie." When the government chooses that procedure, it may later re-indict the defendant if the original order is upheld, since jeopardy will not have attached.

[11] *United States v. Woolard*, 981 F.2d 756, 757 (5th Cir. 1993), *United States v. Cheely*, 36 F. 3d 1439 (9th Cir. 1994); *United States v. Fernandez*, 231 F.3d 1240 (9th Cir. 2000), *United States v. Acosta-Martinez*, 252 F.3d 13, 16 (1st Cir. 2001).

Similarly, the Sixth Circuit in this case relied on its earlier opinion in *United States v. Presser*, 844 F.2d 1275, 1280 (6th Cir. 1988):

> In *Presser*, we exercised jurisdiction over the United States's appeal from an order granting a defendant's discovery request because the district court indicated that if the United States failed to comply, it would suppress the relevant evidence, which would likely result in dismissal of the indictment. Here, the United States's failure to comply with the district court's discovery order resulted in dismissal of the death penalty notice – in effect, a partial dismissal of the charge.

266 F.3d at 535-36.[12] In fact, the notice of intent to seek the death penalty is *not* a part of the grand jury's indictment, and the district court's order dismissing that notice did *not dismiss* any portion of the grand jury's charge. As a result, the circuit court erred in holding that 18 U.S.C. § 3731 provided a jurisdictional basis for the Government's appeal.[13]

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[12] The circuit court's description of *Presser* is puzzling. The *Bass* opinion treats *Presser* as a decision based on the first paragraph of § 3731, the one at issue here, which provides for appeals from dismissals of indictments or counts. But *Presser* itself is explicitly based on the *second* paragraph of § 3731, which permits the Government to appeal a suppression order without regard to the possibility that it may result in a dismissal. *Presser*, 844 F.2d at 1279, n.5.

[13] In light of the jurisdictional question in this case – which the Government does not address – the Solicitor General's suggestion of summary reversal (Government's Petition for Writ of Certiorari ("Pet.") p. 24) is peculiarly inappropriate, given that such a disposition (even if it were tenable on the merits) would create a binding precedent on a jurisdictional issue of first impression by construing a statute inconsistently with its explicit language without the benefit of briefing and argument.

II. THIS CASE IS NOT RIPE FOR REVIEW ON CERTIORARI BY THIS COURT

Throughout the litigation below, the Government refused to address critical factual issues in the district court. As a result, there is no record to support the Government's essential claims in its petition for review by this Court.

The starting point is the circuit court's order on remand. On appeal, the Government argued at length that the discovery order required production of documents that are exempt from disclosure by the work product and deliberative process privileges – or irrelevant or non-existent – and that it was excessively burdensome. Brief for the United States ("Br.") pp. 3, 17, 19, 26, Reply Brief for the United States, p. 14. (The Government later raised these same claims again, in its Petition for Rehearing En Banc, p. 8). The Sixth Circuit addressed these issues as best it could, given the state of the record:

> [T]he United States argues that the requested items are either not relevant, non-existent, or already in Bass's possession. The district court indicated that it would hear from the United States as to the unavailability or irrelevancy of particular documents, but the United States chose instead to refuse to comply with the entire order. That refusal also prohibited the district court from reviewing the requested documents to determine whether the United States' claimed privileges applied to any of them. Therefore, we find the record insufficiently developed to allow us to assess the merits of the United States's arguments relating to the content of the requested documents. Because of this, and because we think the district court should have the opportunity to review each requested item's

> relevancy and privileged status in the first instance, we remand to the district court with instructions to allow the United States to produce the documents for an *in camera* review. If the United States again fails to comply, the district court remains free to impose whatever sanction it deems appropriate under the circumstances.

266 F.3d 532, 540.[14] Rather than availing itself of this opportunity to remedy the defects in the record – and by doing so, enable the lower courts to address the central issues in the case – the Government on remand again refused to produce any documents whatever, on discovery or for review by the district court *in camera*. Instead it filed its petition in this Court.

In its Petition for Certiorari the Government no longer argues the issues of *privilege* or *undue burden* by name. Given the remand from the circuit court, and its refusal to address these issues in the district court, how

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[14] Earlier in its opinion, the Sixth Circuit explained:

> The district court, *noting that the United States did not offer any of the allegedly privileged materials for in camera review*, further found that any privileges that may have attached to the materials were outweighed by the constitutional interests implicated by Bass's allegations . . . . 266 F.3d at 535 (emphasis added).

In other words, given the circumstances created by the Government, the district court held that the conditional privileges cited by the Government do not *categorically* trump the defendant's constitutional claims. *See, Hickman, v. Taylor*, 329 U.S. 495, 511 (1947); *EPA v. Mink*, 410 U.S. 73, 86-87 (1973); *United States v. Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944) (L. Hand, J.). Needless to say, the district court could not decide on the actual status of particular documents except by examining them, as it was directed to do on remand, if the Government requested it.

could it? Instead, the Government makes the same arguments by other names – or, to be precise, in general terms with no names at all. For example, the petition repeatedly asserts that the Government will be required to produce "thousands" of documents (Pet., pp. 12, 20), a "vast array" of documents (Pet., p. 20), and "voluminous" documents (Pet., p. 21), and that assembling them would be "time consuming and highly burdensome." Pet., p. 20. Similarly, the petition argues that the discovery order requires the disclosure of "highly sensitive internal documents" (Pet., pp. 12, 20), will expose and interfere with internal prosecutorial deliberations (Pet., pp. 12, 20), and will "stifle" or "disrupt" frank and orderly prosecutorial decision making. Pet., pp. 12, 21. These doomsday predictions are the very claims of "undue burden" and "privilege" that the Government argued on appeal but has steadily refused to address concretely in the district court, now stated in vaguer terms.

Normally, the sort of factual claims that are alleged in the Government's petition are resolved in the first instance by trial courts, with the assistance of the Government. *United States v. Armstrong*, 517 U.S. 456 (1996), the leading case relied on by the Government, is a good example:

> The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution.

517 U.S. at 460.[15] No similar evidence was presented here. The specific claims of privilege that the Government converts here into less specific claims of prejudice are generally resolved by submission of documents to the trial court *in camera* – as the Sixth Circuit explicitly suggested in its remand. *See*, *EPA v. Mink*, 410 U.S. 73, 88 (1973); *Wayte v. United States*, 470 U.S. 598, 616-18 (1985) (Marshall, J., dissenting); *United States v. Berrios*, 501 F.2d 1207, 1212 (2nd Cir. 1974). By refusing to submit any documents to the district court the Government has made that impossible. Without ever seeing any of them, the

[15] Specifically, in *Armstrong*:

> The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because "there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations." . . . The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "large-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack."

517 U.S. 456, 460 (citations omitted).

Similar submissions by the Government are common in less celebrated cases. *See, e.g., United States v. Green*, 108 F. Supp. 2d 1169, 1171 (D. Kan. 2000) (government presented testimony from several people); *United States v. Candia-Veleta*, 104 F.3d 243, 245 (9th Cir. 1996) (government presented evidence on charging practices).

district court could not possibly determine whether an entire class of documents is covered by the work product or deliberative process privileges; nor (as the issues are restated here) could it decide whether the documents requested are "highly sensitive," or whether producing them would be "highly burdensome."

This same sensible practice has been followed in two other cases in which district courts have initially granted motions for discovery on the issue at stake here: the possibility of racial discrimination in federal capital charging.[16] In *United States v. Bradley*, 880 F. Supp. 271, 281 (M.D. Pa. 1994), the court issued a discovery order, admonished the parties to cooperate in expediting and simplifying the process, and stated that it would consider the Government's privilege claims *in camera*.[17] In response the Government provided some limited information to the defendant, and submitted other documents to the court *in camera*. After reviewing that submission, the district court

[16] In a third case, *United States v. Glover*, 43 F. Supp. 2d 1217, 1234-35 (D. Kan. 1999), the defendant pled guilty two weeks after the district court issued a similar order, mooting the issue. *See* http://www.capdefnet.org/fdprc/contents/shared_files/docs/time.htm, *infra*, note 24.

[17] "[T]he court will allow the defense a short amount of time to obtain the discovery it seeks, and admonishes both sides to be as cooperative as possible so as to ensure that discovery is timely completed. . . . The government contends that the material sought by Defendant is protected by the deliberative process privilege. . . . At this stage, the court is unable to determine whether the information sought by Defendant would fall within either the deliberative process or work product categories. However, once the defense sets forth precisely what information it seeks, the court will permit the government to reassert these privileges. The court might then order an *in camera* review of the documents to determine if they truly fall within the parameters of these two doctrines." 880 F. Supp. 271, 281.

ruled against the defendant on the underlying motion to dismiss for selective prosecution, and it held the Government need not turn over to the defendant any of the documents submitted for *in camera* review. *United States v. Bradley*, CR-92-200-01, Mem. & Order 4/27/94. More recently, in *United States v. Llera-Plaza*, 181 F. Supp. 2d 414 (E.D. Pa. 2002), the district court ordered discovery of documents pertaining to other capital-eligible federal prosecutions in the Eastern District of Pennsylvania. After two motions for reconsideration and partial production of the requested documents, the district court ordered the Government "to produce for the court, under seal for its *in camera* inspection, certain of the materials" covered by the earlier order, 181 F. Supp. 2d at 418. The Government complied, *id.* at 420, and on the basis of that evidence the district court ruled that "[t]he government will not be directed to turn over any of the submitted materials to the defendants because, in the court's judgment, the materials contain no evidence supportive of the defendants' Motion to Bar the Death Penalty." 181 F. Supp. 2d at 420. Accordingly, the defendants' motion to dismiss was denied on the merits. *Id.* at 421.[18]

[18] In other reported post-*Armstrong* cases in which the Government has appealed district court orders granting discovery on claims of selective prosecution, the Government has consistently provided more information to the lower court, and created a more complete record, than in this case. In *United States v. Turner*, 104 F.3d 1180 (9th Cir. 1996), which was decided in the district court before *Armstrong* and reviewed on appeal after *Armstrong*, the Government submitted extensive affidavits, on the record and under seal, for the district court's use in its initial decision on the discovery motion. In *United States v. Olvis*, 97 F.3d 739 (4th Cir. 1996), the Government presented extensive affidavits and testimony describing its charging practices. And in *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997), the

(Continued on following page)

The issues of privilege, relevance and undue burden are not the only ones that have been left unresolved in the lower courts. The substantive motion to which the trial court's discovery order was directed – Respondent's motion to dismiss the request for the death penalty – has never been reached. One of the important advantages of the *in camera* production procedure suggested by the Sixth Circuit is that it would enable the district court to address the discovery motion and the underlying motion to dismiss simultaneously, on the basis of adequate facts. This is exactly what happened in *United States v. Bradley*, and *United States v. Llera-Plaza*. In the present case, if the discovery order is reversed on review, the district court will have to consider that motion to dismiss in the absence of any evidentiary assistance from the Government.

Government ultimately complied with much of the discovery order, and submitted one disputed document to the district court for *in camera* review. (In at least two cases the Government complied fully with such discovery orders in the district court. In *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999), the Government complied with a similar discovery order, and made the same discovery available to several other defendants in the same district; only one of the defendants who obtained discovery persisted in his motion to dismiss, and it was denied. *See, United States v. Daniels*, 141 F. Supp. 2d 140, 143, 145 (D. Mass. 2001). And in *United States v. Correa-Gomez*, 160 F. Supp. 2d 748 (E.D. Ky. 2001), *appeal pending*, the Government produced the required discovery under seal, and the district court granted the defendant's motion to dismiss. *See also Branch Ministries, Inc. v. Charles Rossotti*, 970 F. Supp. 11 (D.D.C. 1997) and 40 F. Supp. 2d 15 (1999), a civil case against the Internal Revenue Service in which the Government complied with a discovery order issued under the authority of *Armstrong*.) In the present case the Government has presented no factual information whatever, under seal or otherwise – not at the original hearing on the motion for discovery, not on its motion for reconsideration, not in compliance with the discovery motion itself, and not on remand from the Sixth Circuit.

In addition, the Petition for Certiorari makes new factual claims that were never made to the district court and are not part of the record on appeal. The Government criticizes the Sixth Circuit for relying "on incomplete statistics from which the court drew inferences that are now known to be incorrect." Pet., p. 15. This is a disputed factual argument, and, Respondent submits, it is wrong. More important, the argument is based on materials that the Government itself admits "were released after the district court's decision and provided to the court of appeal" (Pet., p. 14) – to wit, the Ashcroft Report, *supra* note 2, which was lodged with the court the week before oral argument. The Sixth Circuit, of course, could not properly consider that report on appeal because it had not been in the record before the district court. But if the report materially supports the Government's claims, why did the Government fail to bring it to the attention of the district court on remand, by motion for reconsideration or otherwise?

Finally, the Government contends that the Sixth Circuit's discussion of data on plea bargains in federal capital cases is immaterial because Respondent "was offered a plea bargain but declined to take it." (Pet., p. 16) This is a highly debatable claim, to say the least, considering that there is a pending motion to dismiss the indictment against Respondent, based on substantial allegations of governmental misconduct that produced an extraordinary violation of the confidentiality that was promised to the Respondent in his plea negotiations with the Government. *See supra,* note 2. More important, although the Government raised this claim in oral argument in circuit court, and in its petition for rehearing en banc, it has never addressed the issue in district court – not in its brief

or argument on the original motion for discovery, not in its motion for reconsideration, and not on remand from the Sixth Circuit after the issue was addressed in that appellate court in the absence of a factual record.

III. THE DECISION BELOW AFFIRMING THE DISCOVERY ORDER IS CONSISTENT WITH CONTROLLING PRECEDENTS FROM THIS COURT

The Government argues that the decision of the court of appeals "violates the teachings of *McCleskey v. Kemp* [481 U.S. 279 (1987)]." Pet., p. 17. The short answer is stated succinctly in the Sixth Circuit's opinion: The issues are not the same. In *McCleskey* this Court had to decide:

> whether the defendant had carried his burden of proof on the *merits* of his selective prosecution claim. In contrast, we must determine only whether Bass has shown "some evidence tending to show the existence of . . . discriminatory intent" sufficient to warrant *discovery*. . . . *McCleskey* will certainly preclude Bass's selective prosecution claim if, at the end of discovery, he fails to show any additional evidence that the United States intentionally discriminates against blacks through the death penalty protocol. It does not, however, pose any bar to Bass at this preliminary stage.

266 F.3d 532, 539-40 (citations omitted, emphasis added). (McCleskey, of course, received extensive discovery in preparation for his selective prosecution claim, beyond

anything Respondent has sought in this case.)[19] As the circuit court points out, "[o]bviously, a defendant need not prove his case in order to justify discovery on an issue." *Id.*, quoting *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998).

Even so, an additional short comment on *McCleskey* is in order. In *McCleskey* the Court denied the defendant's claim in part because it is extremely "difficult to deduce a consistent policy by studying the decisions of [the] ... many unique entities" involved in capital charging, prosecution and sentencing in Georgia. 481 U.S. at 295, n.15. The Government cites this footnote but neglects to point out the striking differences between the issues here and in *McCleskey*. First, since the only question here is *charging*, there is no need to consider the actions of juries (the most unique and least accountable of the "many entities" in *McCleskey*) or of judges. Second, even when the focus is limited to the decision to charge, this case presents a far simpler situation than *McCleskey*: the charging decisions in *McCleskey* were made under the authority of hundreds of separate District Attorneys, each of whom "is elected by the voters in a particular county." *Id.*, citing. Ga. Const., Art. 6, § 8, para. 1. The charging decisions here were all made by a single unified agency, the United States Department of Justice.

The Government faults Respondent for relying on nationwide statistics, and argues that the various United

[19] *See, e.g.*, 481 U.S. at 361 n.13: "As a result of McCleskey's discovery efforts, the record also contains relevant testimonial evidence by two state officials." (Describing the depositions of prosecutors Lewis R. Slaton and Russel Parker on the bases for their capital charging decisions.)

States Attorneys make "independent decisions" whether to charge defendants with capital eligible offenses. Pet., p. 18. In fact, unlike the hundreds of constitutionally separate and independently elected District Attorneys in Georgia,

> All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General [except certain functions concerning administrative law judges and Federal Prison Industries].

28 U.S.C. § 509; *see also* 28 U.S.C. § 519. Judge Learned Hand described this system in 1930:

> The Attorney General has powers of "general superintendence and direction" over [United States] district attorneys [citation omitted]. ... Thus he may displace [federal] district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive. ... His powers must be coextensive with his duties.

Sutherland v. International Insurance Co., 43 F. 2d 969, 970 (2d Cir. 1930); *see also United States v. Sells Engineering*, 463 U.S. 418, 470-72 (1983) (Burger, C.J., dissenting). The Department of Justice's official position is the same. 6 Op. O.L.C. 47 (1982) (T. Olson, Asst. A.G., O.L.C.). The elaborate "protocols" that regulate federal capital charging are a striking illustration of this centralized power. Just as "[t]he decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer," *McCleskey*, 481 U.S. at 295, n.15, the decisions

of a single prosecutorial agency over time are fairly attributable to the agency.

In *United States v. Llera-Plaza, supra*, the Government took exactly the opposite position to the one it argues here:

> [T]he government contends that it is inapposite to single out another case in this district – Merlino – for comparison with the case at bar, as distinct from comparing the case at bar with any or all of the scores of federal criminal prosecutions for death-eligible offenses in other districts.

181 F. Supp. 2d at 420. In truth, discrimination by race at either level is unconstitutional. It is a violation of the equal protection clause to stop or search a motorist because of his race, *United States v. Whren*, 517 U.S. 806, 813 (1996), whether the decision to do so is based on a general practice of the police department, or the individual predilections of a specific officer. At this point, of course, Respondent cannot *prove* discrimination either nationally or locally, but he has made a sufficient showing to justify the district court's order granting discovery.

In determining that Respondent made a sufficient showing to justify discovery, the court of appeals correctly applied this Court's decision in *United States v. Armstrong*, 517 U.S. 456 (1996). Under *Armstrong*, a defendant seeking discovery must present "some evidence tending to show the existence of the essential elements of the defense" of discriminatory prosecution – that is, the defendant must present some evidence of discriminatory effect and discriminatory intent. *Id.* at 468, quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974). In the usual case, this preliminary showing on discriminatory

effect must include "some evidence that similarly situated defendants of other races could have been prosecuted, but were not . . . ." *Id.* at 469.

One could argue that the stark racial disparities reflected in the DOJ Study are themselves "some evidence" of differences in prosecution patterns by race[20] – but that is not necessary. As the court of appeals points out, at the time the DOJ Study was released, Deputy Attorney General Holder admitted this disparate impact: "I can't help but be both personally and professionally disturbed by the numbers that we discuss today. . . . [N]o one reading this report can help but be disturbed, troubled, by this disparity. . . . I'm particularly struck by the facts that *African-Americans and Hispanics are overrepresented in those cases presented for consideration of the death penalty*, and those cases where the defendant is actually sentenced to death." *United States v. Bass*, 266

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[20] In *Ah Sin v. Wittman*, 198 U.S. 500 (1905), the defendant complained about his conviction under an ordinance "prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering." *See, Armstrong*, 517 U.S. at 566. The Court held that in addition to alleging "that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise'," *id., quoting Ah Sin*, 198 U.S. at 507, he had to allege "that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." *Id.* In *Armstrong* itself the comparable issue was the racial composition of the corps of crack cocaine traffickers in Los Angeles in 1992. Arguably, a glaring racial disparity has more obvious implications in the context of the entire universe of federal capital murder prosecutions than in the comparatively obscure contexts in *Ah Sin* and *Armstrong* – especially given such well known background facts as the proportion of white defendants on federal death row (21% as of July, 2000) and the proportion of white defendants on state death rows (55%). DOJ Study at 36 n.28.

F.3d at 538 (emphasis in original). In *Armstrong* the Court reserved the question of whether a prosecutorial admission of *discriminatory purpose* would suffice to fulfill the defendant's burden on discriminatory effect.[21] Here we have a simpler situation: a Governmental *admission of discriminatory effect*, which is necessarily sufficient proof on the very point that is admitted.[22]

And what about discriminatory intent? In *Armstrong* this Court did not specify how that element should be proven, and for good reason. Ultimately, under *McCleskey*, a defendant who alleges discriminatory prosecution must prove discriminatory intent in his specific case, but, in the nature of the issue, the lower burden that must be carried at the initial stage of discovery will generally be met by circumstantial evidence. In this case, the court of appeals relied on two factors:

> [T]he stark discriminatory effect of the federal death penalty protocol, coupled with the Department of Justice's official statements recognizing the possibility of intentional discrimination in light of the protocol's discriminatory effect

[21] "We reserve the question whether a defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.' Brief for United States 15." *Armstrong*, 517 U.S. at 469 n.3.

[22] In addition, the Sixth Circuit notes that the record includes evidence of a narrower class of white defendants who were treated more favorably than black defendants in federal capital prosecutions: " . . . Bass has identified a pool of similarly situated defendants – those whose crimes shared sufficient aggravating factors that the United States chose to pursue the death penalty against each of them. Of those defendants, the United States enters plea bargains with one in two whites; it enters plea bargains with one in four blacks." *Bass*, 266 F.3d at 539.

> presents some evidence tending to show that race in fact plays a role in the United States's decision-making process.

Bass, 266 F.3d at 540.

This last point deserves some emphasis. At the time the DOJ Study was released, Attorney General Reno held a press conference, a transcript of which is in the record below. Joint Appendix ("JA") pp. 94-104. After describing the findings in general terms, and expressing her deep concern about the racial disparities reported, she said:

> More information is needed to better understand . . . how homicides make their way into the federal system, and once in the federal system, why they follow different paths. An even broader analysis must be undertaken to determine if bias does, in fact, play any role in the federal death penalty system.

JA p. 96. She called for studies by experts outside the Department. This was an official statement by the Attorney General who authorized the request for the death penalty in this very case, in reaction to a study she commissioned on the operation of the federal death penalty protocols that were enacted in her administration and under which this defendant was charged. As the Sixth Circuit notes, the Attorney General (like the Deputy Attorney General) was deeply troubled because race may have been biasing federal capital charging, and required more information – from outside experts – to know for sure. 266 F.3d at 539. Accordingly, the court of appeals concludes:

> If the Department of Justice's official position is that these statistics, standing alone, show

> sufficient evidence of the possibility of racial animus to warrant further study, we cannot fairly deny Bass the same opportunity to investigate [that claim] . . . .

Id. Given the circumstances reflected in the record, it was appropriate under *Armstrong* for the circuit court to require the Government to at least attempt to address the factual issues raised by Respondent's motion for discovery.[23]

IV. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW BY THIS COURT ON CERTIORARI

In its petition to this Court, the Government argues that the discovery order in Mr. Bass's case "threatens to stop federal death penalty prosecutions in their tracks," (Pet., p. 12) and "has the potential to disrupt all federal capital cases . . . ." Pet., p. 22. This is melodramatic hyperbole. In fact this case has few implications, if any, for other federal prosecutions – as the Government's petition itself demonstrates.

The decision of the Sixth Circuit was filed on September 25, 2001. In footnote 8 to its petition (Pet., p. 22) the

[23] In the meantime, the National Institute of Justice issued a request for proposals to conduct the independent study of the federal death penalty that was ordered by Attorney General Reno in 2000, and is in the process of awarding the contract for the study. *See* National Institute of Justice, *Solicitation, Research Into the Investigation and Prosecution of Homicide: Examining the Federal Death Penalty System* (July 20, 2001). See *also generally* Dennis O'Brien and David Nitkin, *Glendening Halts Executions; Md. Governor Is Second to Impose Moratorium; Racial, Geographic Inequality Seen; UM Study to Be Reviewed by next General Assembly*, The Baltimore Sun, May 10, 2002, p.1A.

Government lists a dozen cases in which discovery motions similar to the one at stake were rejected. The first opinion cited as inconsistent with the *Bass* decision – *United States v. Jones*, 2002 WL 464678 (5th Cir. 2002) – was filed in late March, 2002, six months after the *Bass* opinion; the second opinion cited in that footnote, *United States v. Minred*, 182 F. Supp. 2d 459 (W.D. Pa. 2002), was filed in February, 2002, over four months after the decision in *Bass*, and shortly before the Government requested an extension of time to file its petition for certiorari. In addition, although not cited by the Government, there is *United States v. Llera-Plaza*, 181 F. Supp. 2d 414 (E.D. Pa. 2002), decided in early January, 2002, in which the district court, after reviewing an *in camera* submission by the Government, denied further discovery as well as the defendant's underlying motion to dismiss. See *supra* text at notes 16-17. The Government's doomsday warnings notwithstanding, this case has hardly affected other federal prosecutions at all, let alone stopped the federal death penalty in its tracks. This modest impact should be no surprise, given the nature of the case: a circuit court opinion on an interlocutory appeal, affirming a discretionary discovery order by a district court judge and remanding the case to give the Government an opportunity to make a presentation to the district court *in camera*.

In addition, even if other courts were inclined to exercise their discretion in the same manner as the district court here, only a handful of other cases share the same factual context. Respondent's motion for discovery was based primarily on a Department of Justice study of the federal death penalty that was conducted under former Attorney General Janet Reno, and on comments made by Attorney General Reno and Deputy Attorney

General Eric Holder at the time that study was released. As the Government points out (Pet., pp. 14-15), the current Attorney General, John Ashcroft, released a second internal study of the federal death penalty in June 2001, which, he claimed, laid to rest any worry that the federal death penalty is affected by racial discrimination.[24] In addition, and more important, in June 2001, Attorney General Ashcroft changed the "protocol" for charging capital and potentially capital federal crimes in two major respects: (1) United States Attorneys are now required to report to the Justice Department in Washington any cases that they might have charged as federal capital crimes but did not; and (2) local federal prosecutors may no longer enter into plea bargains in capital cases without the approval of the Attorney General. Pet., p. 5, n.1.

Arguably, the record in this case speaks only to those federal capital prosecutions that were begun before the administration of Attorney General Ashcroft. Certainly this record has no direct implications for any case in which the request for the death penalty was filed later than June, 2001. As best we can determine, among 31 pending federal capital indictments, there are at most 7 cases (and probably fewer) that are plausibly similarly situated to *Bass* and in which the question before the Court has not yet been reached,[25] and in some of those cases the

[24] As Respondent has noted, *supra* note 2, the Government brought that study to the attention of the circuit court on appeal, but made no effort to put it before the district court on remand.

[25] In the absence of data from the Department of Justice itself, the best available information on this issue can be found at http://www.capdefnet.org/fdprc/contents/shared_files/docs/time.htm, a web page maintained by the Federal Death Penalty Resource Counsel (FDPRC), an organization funded pursuant to the Criminal Justice Act to provide

(Continued on following page)

defendants have no standing to raise the issue at stake here because they are white. (All future federal capital cases, of course, will be well beyond the range of this record). Judging from the track record to date, the Sixth Circuit opinion in the present case is not likely to influence the course of even one of that handful of pending prosecutions.

V. CONCLUSION

For the reasons stated, Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondent

consultation and litigation support services to Federal Defenders, courts, and private defense counsel appointed in federal death penalty prosecutions. According to the FDPRC, there are 31 pending capital indictments that have not been tried, involving 38 defendants. (An additional three cases with four defendants are awaiting re-trial, but in those cases this issue will have been raised, if at all, before the initial trial). Of these 31 indictments, only 5 indictments, including 7 defendants, were filed during the tenure of Attorney General Reno. An additional 3 cases with 5 defendants were filed after Reno left office but before June, 2001. For 3 single-defendant indictments the date on which the notice of intent to seek the death penalty was filed is not listed; judging from the trial and indictment dates it appears that in one of these three cases the notice of intent was filed before June, 2001. This means that 9 cases involving 13 defendants could possibly be similarly situated to Mr. Bass. In at least 2 of these 9 cases, including 3 defendants, the motion at issue here has already been denied. *United States v. Llera-Plaza, supra*; *United States v. Minred, supra*.

Supreme Court, U.S.
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(2)

No. 01-1471

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN BASS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent fails to undercut the government's central submission: The decision of the court of appeals warrants review and reversal because it directly contradicts two of this Court's decisions and unjustifiably interferes with the government's pursuit of a capital case as authorized by Congress and approved by the Attorney General. The court of appeals' decision flouts *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), by affirming the discovery order despite respondent's failure to present any evidence that "similarly situated individuals of a different race were not prosecuted." The decision below also overrides *McCleskey* v. *Kemp*, 481 U.S. 279, 292, 294-295 & n.15 (1987), by relying on aggregate, national statistics as evidence of discrimination rather than requiring facts that bear on the individualized decisions of the prosecutors in this case.

Respondent does not defend the court of appeals' application of *Armstrong* but instead argues—incorrectly and contrary to the court of appeals' opinion—that *Armstrong*'s

similarly-situated requirement does not even apply in this case. Regarding *McCleskey*, respondent first simply repeats the court of appeals' unpersuasive refusal to apply *McCleskey* to the discovery stage, and then attempts unsuccessfully to distinguish *McCleskey* on grounds on which the court of appeals did not rely.

Respondent also offers several procedural arguments against review, including that this Court lacks jurisdiction because the case was not properly "in the court of appeals" as required by 28 U.S.C. 1254, that the case is not ripe for review, and that the case has few implications for other federal prosecutions. None of these assorted arguments, however, provides a persuasive reason why this Court should decline to review the court of appeals' decision, which defies precedents of this Court that provide critical protections against intrusion by the judiciary into the core prosecutorial function of the Executive Branch.

1. a. Respondent is unable to reconcile the court of appeals' decision with *Armstrong*. As explained in the petition (at 15-17), the court of appeals acknowledged that *Armstrong*'s similarly-situated requirement applies to respondent's case, but inexplicably found the requirement satisfied by statistics regarding individuals in the plea bargaining process. The plea bargaining statistics have no relevance to respondent's claim, which is that the government discriminated against him when it *charged* him for a capital-eligible offense. The plea bargaining statistics do not concern individuals who were not charged; rather, they concern individuals who were charged with capital-eligible offenses and against whom the Attorney General had already authorized the government to seek the death penalty.[1]

[1] Respondent asserts that the government's contention that he declined a plea bargain is "highly debatable" (Br. in Opp. 18), but he nowhere challenges the government's more fundamental point that he "has never claimed that he was not offered a plea bargain because of his race." Pet. 16. Indeed, respondent agrees that "the only question here is *charging*." Br. in Opp. 20. See Pet. App. 16a (Nelson, J., concurring in part and dissenting in part) (Respondent "is not alleging that the office of the U.S. Attorney for the district where his case is pending—the Eastern District of Michigan—declined to negotiate a plea bargain with him because of his race."). Respondent's own account of his withdrawal from his initial agreement to enter a plea bargain provides no support for any claim of racial discrimination in the government's interactions with him on the plea offer. See Br. in Opp. 1-2 & n.1 As for respondent's suggestion that his refusal to accept the government's plea offer was triggered by other governmental misconduct, *ibid.*, that accusation is both irrelevant and inaccurate. See Gov't Resp. and Br. in Opp. to Def. Mot. to Dismiss on Grounds of Prosecutorial Misconduct.

Respondent makes no attempt to defend the court of appeals' reliance on the plea bargaining statistics or to explain how that reliance can be reconciled with *Armstrong*. Nor does respondent attempt to identify some other pool of similarly-situated defendants of another race that might satisfy *Armstrong*'s requirement. Instead, respondent makes the novel claim (Br. in Opp. 22-26) that there is an exception to *Armstrong*'s requirement when the government admits a discriminatory effect, and that former Deputy Attorney General Holder's statements at the press conference releasing the initial Department of Justice (DOJ) survey of capital cases (*DOJ Survey*) constituted such an admission.

The court of appeals, however, did not rely on an exception to *Armstrong*. On the contrary, the court held that the *Armstrong* requirement *does* apply to respondent's case, but that respondent satisfied it with statistics that have no relevance to the discriminatory conduct that he alleges. That contention cannot be defended.

Nor can respondent's new theory support the judgment, because there has been no governmental admission of discriminatory effect. *Armstrong* establishes that, in selective prosecution cases, "discriminatory effect" means that simi-

larly-situated individuals of another race were not prosecuted. 517 U.S. at 465. No federal official has *ever* stated that individuals *similarly situated to respondent* were not charged with capital eligible offenses. The former Deputy Attorney General's statement, based on the *DOJ Survey*, that blacks "are over-represented in those cases presented for consideration of the death penalty" was not a statement that *similarly situated* blacks and whites were treated differently. *DOJ Survey* 5. As carefully explained in the petition and in the report that accompanied the release of the *DOJ Survey*, that survey did "not include information regarding the entire pool of potential capital-eligible defendants," and therefore did not contain sufficient information from which to draw any such conclusion. *DOJ Survey* 10; see Pet. 14.[2]

b. Respondent also fails to explain how the court of appeals' decision can be reconciled with *McCleskey*. He reiterates (Br. in Opp. 19-20) the court of appeals' statement that *McCleskey* addressed a selective prosecution claim on the merits while this case is at the discovery stage. But he fails to explain how that difference negates the applicability of *McCleskey*'s holding that statistics that aggregate independent decisions by multiple prosecutors are not evidence that any particular prosecutor acted with discriminatory purpose. Although respondent need only show "some evidence" of discrimination "to obtain discovery," *Armstrong*, 517 U.S. at 468, 469, *McCleskey* requires that this evidence

[2] The former Deputy Attorney General's statement in this case that blacks are over-represented in capital cases is no different than the government's statement in *Armstrong* that more than 90% of those sentenced for crack cocaine trafficking in 1994 were black. See 95-157 U.S. Br. at 30 (citing sentencing statistics). As the Court explained in *Armstrong*, such over-representation is not equivalent to the disparate effect that is essential to support a claim of selective prosecution. See 517 U.S. at 469-471.

tend to prove that "the decisionmakers in *his* case acted with discriminatory purpose." 481 U.S. at 292. Respondent has offered no evidence that meets that requirement.

Respondent argues (Br. in Opp. 20-22) that *McCleskey* is inapplicable here because, unlike in *McCleskey*, all the prosecutors whose decisions are reflected in the *DOJ Survey* work for the Department of Justice. Respondent argues that the Attorney General controls all those prosecutors, and respondent points to the protocols regulating federal capital charging as "a striking illustration of this centralized power." *Id.* at 21. The court of appeals, however, did not even purport to distinguish *McCleskey* on that ground. On the contrary, the court of appeals stated that "*McCleskey* will certainly preclude [respondent's] selective prosecution claim if, at the end of discovery, he fails to show any additional evidence" of discrimination beyond the *DOJ Survey* statistics. Pet. App. 14a.

Respondent's attempted distinction of *McCleskey* is also lacking in merit. The protocol that governed the charging process in this case, and in the other cases included in the *DOJ Survey*, vested the decision whether to charge a defendant with a capital-eligible offense in the individual United States Attorneys, not in the Attorney General. Pet. 3. Respondent has offered no evidence that the Attorney General or any other Justice Department official exercised control over the charging decisions of the individual prosecutors, contrary to the stated policy in the protocol. Moreover, the statistics in the *DOJ Survey* categorically refute any claim that the former Attorney General was herself discriminating against minorities in her decisions on the death penalty, see Pet. 15, and respondent makes no such claim here.[3]

[3] Respondent errs in contending (Br. in Opp. 22) that the government's position in *United States* v. *Llera Plaza*, 181 F. Supp. 2d 414 (E.D.

2. Respondent's various procedural objections to this Court's review also lack merit.

a. Respondent incorrectly contends (Br. in Opp. 4-10) that this Court lacks jurisdiction to review this case on certiorari because it was never properly "in the court of appeals" as required by 28 U.S. 1254. Respondent never questioned that the case was properly before the court of appeals until his brief in opposition in this Court. He did not address the jurisdictional issue before the panel or in response to the petition for rehearing en banc, even though the government briefed the issue in detail, Gov't C.A. Br. 2, 13-

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Pa. 2002), is inconsistent with its position in this case. The prosecutorial decision challenged in *Llera Plaza* was the decision to authorize the death penalty. *Id.* at 414-415. The government took the position that such a claim should be characterized as an attack on the Attorney General's action since the Attorney General alone authorizes pursuit of a death sentence; accordingly, the government argued that all cases in which the Attorney General made that decision are relevant to an allegation that she discriminated. Gov't Opposition to Defendant's Motion to Bar the Death Penalty Due to Alleged Racial Discrimination at 9-10 & n.12 (filed Sept. 14, 2001); see 181 F. Supp. 2d at 420. Here, in contrast, the decision at issue—whether to charge respondent with a capital-eligible offense in the first instance—was not made by the Attorney General but by the U.S. Attorney for the Eastern District of Michigan. Independent decisions by other U.S. Attorneys whether or not to charge defendants in other districts are not relevant to whether the U.S. Attorney for the Eastern District of Michigan discriminated against respondent. Indeed, the court in *Llera Plaza* held that "it makes good sense to regard the practices of a particular district as the primary area of inquiry" even where the defendant challenges a decision to seek the death penalty, 181 F. Supp. 2d at 421, because the court concluded that recommendations to seek the death penalty by a U.S. Attorney have a high correlation with the Attorney General's ultimate decision. *Ibid.* Whether or not that analysis is correct when analyzing decisions to seek the death penalty, it plainly applies when the challenge is to a *charging decision* that is vested with the U.S. Attorney and in which other districts and the Attorney General are not involved.

18, and the court of appeals addressed the issue in its opinion, Pet. App. 4a-5a. Respondent's failure to question the jurisdiction of the court of appeals is not surprising, because every circuit that has addressed the issue has concluded that the courts of appeals have jurisdiction under 18 U.S.C. 3731 to review the dismissal by a district court of the government's notice of intent to seek the death penalty. Pet. App. 4a-5a; *United States* v. *Acosta-Martinez*, 252 F.3d 13, 16-17 (1st Cir. 2001); *United States* v. *Cheely*, 36 F.3d 1439, 1441 (9th Cir. 1994); *United States* v. *Woolard*, 981 F.2d 756, 757 (5th Cir. 1993).

Section 3731 authorizes the government (except where precluded by the constitutional protection against double jeopardy) to appeal from any order of a district court "dismissing an indictment or information * * * as to any one or more counts" or "suppressing or excluding evidence." Section 3731 further states that its "provisions * * * shall be liberally construed to effectuate its purposes," which, this Court has repeatedly explained, are "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, 420 U.S. 332, 337 (1975); see *United States* v. *Loud Hawk*, 474 U.S. 302, 313 (1986); *United States* v. *Di-Francesco*, 449 U.S. 117, 131 (1980); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977).

Dismissal of a death penalty notice acts as a partial dismissal of the indictment for a capital offense, because the grand jury's indictment for such an offense includes an implicit authorization to pursue the statutorily authorized penalty of death. The death penalty notice is the supplemental charging document through which the government signals its intent to avail itself of that authorization. 18 U.S.C. 3593(a). Dismissal of the death penalty notice not only prevents the government from seeking the death penalty but nullifies the grand jury's decision to charge the

defendant with a capital-eligible offense and thus narrows the authorization granted by the grand jury's indictment.

Even if the court of appeals lacked jurisdiction under Section 3731, the case would still have been properly in the court of appeals because the government also sought review by way of mandamus. See Gov't C.A. Br. 2, 16-18; *Acosta-Martinez*, 252 F.3d at 17 (relying on mandamus as alternative basis to review dismissal of death penalty notice); *Cheely*, 36 F.3d at 1441 n.1 (same). See generally *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976) (mandamus appropriate when "the party seeking issuance of the writ ha[s] no other adequate means to attain the relief he desires").

b. Respondent also errs in arguing (Br. in Opp. 11-19) that this case is not ripe for review because the government did not submit the requested documents for *in camera* inspection and final resolution of claims of privilege, irrelevance, or undue burden. That argument overlooks that the district court determined, even before the court of appeals issued its decision, "that any privileges that may have attached to the materials were outweighed by the constitutional interests implicated by [respondent's] allegations." Pet. App. 4a; see 10/24/00 Tr. 48, 50. There was no reasonable likelihood that the district court would reconsider that decision on remand.

Respondent's ripeness concerns are unfounded in any event, because the government has not raised any claims of privilege, irrelevance, or undue burden in this Court, and the claims that the government has raised would not be clarified in any way by *in camera* review. The government presents two claims: (1) that respondent is not entitled to discovery absent a showing that similarly-situated defendants of another race were not charged with capital-eligible crimes; and (2) that respondent cannot rely on national statistics that aggregate the independent charging decisions of multiple

federal prosecutors. Respondent fails to explain how the content or volume of the documents that petitioner seeks bears on the resolution of either of those claims.

Respondent incorrectly contends (Br. in Opp. 12-13) that the government is pressing its privilege and undue burden claims in this Court by the subterfuge of using other names for those contentions. In fact, however, the government has argued that the Court's review of the questions presented is *important* because the discovery order requires the production of voluminous and sensitive internal documents that discuss prosecutorial decisionmaking, and it therefore trenches on core executive powers. See Pet. 12, 20-23. But that argument is not tantamount to raising substantive claims of privilege and undue burden.

c. Finally, respondent asserts (Br. in Opp. 26-29) that the court of appeals' affirmance of the discovery order has limited importance for future prosecutions because the factual context in which the case arose has been altered by supplemental data (the *DOJ Supplemental Survey*) that clarify that race does not improperly influence federal capital charging decisions and by changes in DOJ procedures. But the government provided the *DOJ Supplemental Survey* to the court of appeals. Although respondent questioned whether submission of the survey was permitted under Federal Rule of Appellate Procedure 28(j), respondent addressed the survey in detail in a supplemental memorandum and "indicated that he had no objection" to the court of appeals' consideration of the survey "in its deliberation on this case" because it is "in the public record" and "bear[s] on the issue to be decided." Supp. Mem. for John Bass 1. The court of appeals nevertheless affirmed the discovery order and gave no indication that the supplemental survey made any difference to the analysis. As for the changes in DOJ procedures, respondent has not offered any reason to believe

that they have materially altered the statistical picture reflected in the DOJ surveys.

More fundamentally, regardless how many cases share the same factual context as this one, the legal errors made by the court of appeals have far-reaching implications for any case in which a defendant seeks discovery based on a claim of selective prosecution. The court of appeals held that a defendant who seeks discovery can make the required showing—that similarly-situated individuals of a different race were not prosecuted—by pointing to differential treatment that is wholly irrelevant to the discriminatory conduct that the defendant alleges. In addition, the court held that a defendant can make the prima facie showing of discriminatory intent necessary to justify discovery through aggregate statistical data of the sort that this Court has held insufficient to create an inference of purposeful discrimination. Taken together, those legal rulings eviscerate the "rigorous standard" for discovery formulated in *Armstrong*, 517 U.S. at 468. Unless this Court intervenes, the decision of the court of appeals thus threatens the very unwarranted intrusion on "the performance of a core executive constitutional function" that the *Armstrong* standard was specifically designed to prevent. *Id.* at 465.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted, and the decision of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2002

SUPREME COURT OF THE UNITED STATES

UNITED STATES v. JOHN BASS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01–1471. Decided June 28, 2002

PER CURIAM.

A federal grand jury sitting in the Eastern District of Michigan returned a second superseding indictment charging respondent with, *inter alia*, the intentional firearm killings of two individuals. The United States filed a notice of intent to seek the death penalty. Respondent, who is black, alleged that the Government had determined to seek the death penalty against him because of his race. He moved to dismiss the death penalty notice and, in the alternative, for discovery of information relating to the Government's capital charging practices. The District Court granted the motion for discovery, and after the Government informed the court that it would not comply with the discovery order, the court dismissed the death penalty notice. A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed the District Court's discovery order. 266 F. 3d 532 (2001). We grant the petition for a writ of certiorari and now summarily reverse.

In *United States* v. *Armstrong*, 517 U. S. 456, 465 (1996), we held that a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent. We need go no further in the present case than consideration of the evidence supporting discriminatory effect. As to that, *Armstrong* says that the defendant must make a "credible showing" that "similarly situated individuals of a different race were not prosecuted." *Id.*, at 465, 470. The Sixth Circuit concluded that respondent had made such a

showing based on nationwide statistics demonstrating that "[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites" and that the United States enters into plea bargains more frequently with whites than it does with blacks. 266 F. 3d, at 538–539 (citing U. S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988–2000), p. 2 (Sept. 12, 2000)).* Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*. And the statistics regarding plea bargains are even less relevant, since respondent *was* offered a plea bargain but declined it. See Pet. for Cert. 16. Under *Armstrong*, therefore, because respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.

The Sixth Circuit's decision is contrary to *Armstrong* and threatens the "performance of a core executive constitutional function." *Armstrong*, *supra*, at 465. For that reason, we reverse.

It is so ordered.

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*In January 1995, the Department of Justice (DOJ) instituted a policy, known as the death penalty protocol, that required the Attorney General to make the decision whether to seek the death penalty once a defendant had been charged with a capital-eligible offense. See Pet. for Cert. 3 (citing DOJ, United States Attorneys' Manual §9–10.010 *et seq.* (Sept. 1997)). The charging decision continued to be made by one of the 93 United States Attorneys throughout the country, but the protocol required that the United States Attorneys submit for review all cases in which they had charged a defendant with a capital-eligible offense. *Ibid.*